150 U.S. 245

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RECORD, CASE No. 13,966.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., ~~308~~. 71

BIDDENA ELLIOTT, WIDOW OF JOHN ELLIOTT, DECEASED, PLAINTIFF IN ERROR,

vs.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

FILED FEBRUARY 15, 1890.

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1 In the Supreme Court of the Territory of Dakota, May Term, 1889.

BIDDENA ELLIOTT, Widow of John Elliott, Deceased, Plaintiff and Appellant,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant and Respondent.

Assignment of Errors.

And the appellant herein says there is manifest error on the face of the record in this:

I. In sustaining defendant's objection to the questions asked of the witnesses Kennedy and Smith as to the carefulness of the deceased in his employment.

II. In sustaining defendant's motion to direct a verdict for the defendant and in directing a verdict for the defendant.

III. In denying plaintiff's motion for a new trial.

M. GRIGSBY AND
BAILEY, DAVIS & LYON,
Attorneys for Appellant.

[Stamped:] Supreme court of the Territory of Dakota. Filed May 14, 1889. J. H. C. Young, clerk.

2 TERRITORY OF DAKOTA, } *ss:*
County of Minnehaha, }

District Court, Fourth Judicial Dist.

BIDDENA ELLIOTT, Widow of John Elliott, Deceased, Plaintiff,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant.
} Summons.

The Territory of Dakota sends greeting to above-named defendant:

You are hereby summoned and required to answer the complaint in this action, which is herewith served upon you, and to serve a copy of your answer on the subscriber at his office, on Phillips avenue *street*, in the city of Sioux Falls, Dakota Territory, within thirty days after the service of this summons on you, exclusive of the day of service. If you fail to answer the complaint within that time the plaintiff will apply to the court for the relief demanded in the complaint.

Dated at Sioux Falls, D. T., this 19th day of June, 1886.

W. H. LYON,
Plaintiff's Attorney.

[Stamped:] Supreme court of the Territory of Dakota. Filed May 14, 1889. J. H. C. Young, clerk.

3 TERRITORY OF DAKOTA, }
County of Minnehaha. }

In District Court, Fourth Judicial District.

BIDDENA ELLIOTT, Widow of John Elliott, Deceased, Plaintiff,
vs.
CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY, Defendant.
} Complaint.

The plaintiff, as the widow of John Elliott, deceased, complains and alleges—

I. That on the first day of November, A. D. 1884, the defendant was a corporation duly incorporated under the laws of the State of Wisconsin and was the owner of a certain railroad known as the Chicago, Wilwaukee & St. Paul railway, together with the track, cars, and locomotives thereto belonging.

II. That on the day and year aforesaid one John Elliott was in the employ of the defendant as a track foreman and was engaged in performing his duties as such foreman on defendant's said railway at the station of Meckling, in Clay county, Dakota.

III. That on said day, while said John Eliiott was engaged in the performance of his said duties at said station and without any negligence on his part, the defendant conducted itself so negligently, carelessly, and unskillfully in the management of a train of cars that, through the gross negligence, carelessness, and unskillfulness of the defendant and its conductor of said train of cars in making a double flying switch and in not giving timely warning thereof nor using proper safeguards to prevent injury to those rightfully on or near defendant's said railway track, the last section of said flying switch, being a part of said train of cars, ran violently against and thereby killed said John Elliott.

4 IV. That at said time said conductor, by the authority of the defendant, had command of the movements of said train and every part thereof, and had the general management thereof and complete control over the persons employed thereon, and had the right at said time to control the movements of said John Elliott, and that said flying switch was made by the direction of said conductor.

V. That the plaintiff at the time of his said death and for many years prior thereto was the wife of said John Elliott.

VI. That by reason of the premises the plaintiff has been damaged in the sum of fifteen thousand dollars.

VII. Wherefore plaintiff demands judgment against said defendant for the sum of fifteen thousand dollars, besides costs.

W. H. LYON,
Attorney for Plaintiff.

[Endorsed:] No. 210. District court, Clay county. Bidnena Elliott, as widow of John Elliott, *vs.* Chicago, Wilwaukee & St. Paul Railway Co. Complaint. Filed Aug. 31, 1886. Leonard W. Bell, clerk. W. H. Lyon, att'y.

5 TERRITORY OF DAKOTA, }
County of Minnehaha. }

In District Court, Fourth Judicial District.

BIDDENA ELLIOTT, Widow of John Elliott, Deceased, Plaintiff, *vs.* CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant. } Answer.

The above-named defendant, answering the plaintiff's complaint:

I. Admits that at the time mentioned in the complaint the defendant was and still is a corporation and the owner of the said railway and its appurtenances; that the said John Elliott was in the service of this defendant as a track foreman, and at the time and place in the complaint alleged one of the cars of the defendant ran against and killed said Elliott, and the defendant denies each and every allegation of the complaint not hereinbefore expressly admitted.

II. For a further and separate answer and defense the defendant alleges—

That at and immediately preceding the time that the said John Elliott was struck and killed, as mentioned in the complaint, he was not in the exercise of ordinary care and prudence, but was then and there guilty of negligence contributing to his death sufficient to bar all right of action against this defendant.

Wherefore the defendant demands judgment dismissing this action, besides costs.

R. P. TRIPP,
Attorney for Defendant.

[Stamped:] Supreme court of the Territory of Dakota. Filed May 14, 1889. J. H. C. Young, clerk.

[Endorsed:] In 4th dist. c't, D. T. Biddena Elliott, &c., *vs.* C., M. & St. P. R'y. Answer. Received a copy of the within this 18th day of July, 1886. W. H. Lyon, att'y for pl'ff. Filed Aug. 31, 1886. Leonard W. Bell, clerk. R. B. Tripp, att'y for def'd't.

6 TERRITORY OF DAKOTA, } ss:
County of Minnehaha. }

In District Court, Fourth Judicial District.

BIDDENA ELLIOTT, Widow of John Elliot, Deceased, Plaintiff,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant. } Verdict.

We, the jury in the above-entitled action, by direction of the court, find in favor of the defendant.

Sioux Falls, D. T., April 9th, 1889.

C. G. COATS, *Foreman.*

[Stamped:] Supreme court of the Territory of Dakota. Filed May 14, 1889. J. H. C. Young, clerk.

[Endorsed:] 2841. In 4th dist. court, Minnehaha county, D. T. Biddena Elliott, &c., *vs.* C., M. & St. P. R'y Co. Verdict. Filed this 9th day of April, 1889. W. D. Stites, clerk.

7 TERRITORY OF DAKOTA, } ss:
County of Minnehaha, }

In District Court, Fourth Judicial District.

BIDDENA ELLIOTT, Widow of John Elliott, Deceased, Plaintiff,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendants.

Plaintiff's motion for a new trial in the above-entitled action coming duly on for hearing before said court on this 10th day of April, 1889, at the city of Sioux Falls, in said county, Grigsby & Lyon appearing for the motion and R. B. Tripp *contra*, and the court having heard the arguments of counsel and being fully advised in the premises—

It is ordered that said motion be, and the same is hereby, denied.

By the court:

FRANK R. AIKENS, *Judge.*

To which order of the court the plaintiffs then and there duly excepted, which exception is allowed.

By the court:

FRANK R. AIKENS, *Judge.*

Dated Sioux Falls, D. T., April 10th, 1889.

Attest: —— ——, *Clerk.*

[Stamped:] Supreme court of the Territory of Dakota. Filed May 14, 1889. J. H. C. Young, clerk.

8 TERRITORY OF DAKOTA, } ss:
County of Minnehaha, }

Fourth Judicial District, District Court.

BIDDENA ELLIOTT, Widow of John Elliott, Deceased, Plaintiff,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant.

Now, on this 10th day of April, 1889, comes the above-named plaintiff and moves the court, pursuant to the notice of intention heretofore given upon the minutes of the court in said action (reference being had to the pleadings, exhibits, depositions, evidence, stenographic report of the testimony, and all orders of the court, the charge, records, and all other proceedings upon the trial), that the verdict of the jury herein be vacated and a new trial granted for the following causes, materially affecting the substancial rights of said plaintiff: For errors in law occurring at the trial and excepted to by the plaintiff, to wit:

I. In sustaining defendant's objections to the questions
9 asked of the witnesses Kennedy and Smith as to the carefulness of said deceased in his employment.

II. In sustaining defendant's motion to direct a verdict for the defendant and in directing a verdict for the defendant.

GRIGSBY & LYON,
Attorneys for Plaintiff.

[Stamped:] Supreme court of the Territory of Dakota. Filed May 14, 1889. J. H. C. Young, clerk.

10 TERRITORY OF DAKOTA, } ss:
County of Minnehaha, }

In District Court, Fourth Judicial District.

BIDDENA ELLIOTT, Widow of John Elliott, Deceased, Plaintiff,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant.

To R. B. Tripp, defendant's attorney:

Take notice that the plaintiff in the above-entitled action intends to move the court that the verdict of the jury herein be vacated and a new trial granted for the following causes, materially affecting the substantial rights of said plaintiff:

For errors in law occurring at the trial and excepted to by the plaintiff:

I. In sustaining defendant's objections to the questions asked of the witness- Kennedy and Smith as to the carefulness of said deceased in his employment.

II. In sustaining defendant's motion to direct a verdict for
11 defendant and in directing a verdict for the defendant.

Said motion will be made upon the minutes of the court in said action, and on the hearing reference will be had to the pleadings, exhibits, depositions, evidence, stenographic report of the testimony, and all orders of the court, the charge, records, and all other proceedings upon the trial.

GRIGSBY & LYON,
Att'ys for Plaintiff.

Due service by copy of the above notice of intention admitted this 10th day of April, 1889; and I hereby consent that the motion for new trial be heard at 9.30 a. m. of this day.

R. B. TRIPP,
Att'y for Def't.

[Stamped:] Supreme court of the Territory of Dakota. Filed May 14, 1889. J. H. C. Young, clerk.

12 [Endorsed:] District court, Minnehaha county. Biddena Elliott *vs.* C., M. & St. P. R'y Co. Notice of intention to move for new trial. Motion for new trial. Order denying same. Filed April 10, 1889. Filed April 10, 1889. W. D. Stites, clerk.

13 TERRITORY OF DAKOTA, } ss:
County of Minnehaha, }

In District Court, Fourth Judicial District.

BIDDENA ELLIOTT, Widow of John Elliott, Deceased, Plaintiff,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant.

Bill of Exceptions.

Be it remembered that at a regular term of the district court in and for the county of Minnehaha, in the fourth judicial district of the Territory of Dakota, at the city of Sioux Falls, in said county, beginning on the 9th day of April, 1889, the above-entitled action came on to be tried on the 10th day of April, 1889, before the Hon. Frank R. Aikens, judge of said court, and a jury empanneled and sworn. Grigsby & Lyon appeared for the plaintiff and R. B. Tripp for the defendant, and thereupon such proceedings were had and such evidence offered and received and rulings made thereon as hereinafter appears, to wit:

It is admitted that the plat marked Exhibit A is substantially a correct plat of the premises and depot grounds at Meckling, and the memoranda thereon is also agreed to between the parties, and said

plat is received in evidence and is referred to and made a part of the bill of exceptions.

(Here follows map marked p. 13*a*.)

It is also admitted that the signals and rules marked Exhibit "B" were in force at the time of the injury and death of said deceased.

Plaintiff's counsel offered in evidence Exhibit "B."

Objected to as incompetent, immaterial, and irrelevant.

Objection overruled. Defendant duly excepted.

14 Thereupon Exhibit "B" was received in evidence and read to the jury as follows:

EXHIBIT "B."

"*Signals and Rules*

To be observed by conductors, engineers, station agents, and employés of the Chicago, Milwaukee and St. Paul railway, who will be held responsible for any violation of them.

"3. Every conductor, engineer, station agent, and track foreman must keep a copy of the time-table and rules constantly on hand while on duty.

"35. The conductor will have charge of the train and of all persons employed on it and is responsible for its movements while on the road except when his directions conflict with these rules or involve risk or hazard, in which case the engineer will be held alike accountable.

"42. Flying switches are prohibited except at spur sidings.

"50. Conductors when at stations will attend to switching personally.

"69. Track foremen and their men must at all times hold themselves in readiness to aid the passage of trains and, in case of accident or delay, will obey the orders of the conductors."

[Stamped:] Supreme court of the Territory of Dakota. Filed May 14, 1889. J. H. C. Young, clerk.

15 *Plaintiff's Testimony.*

JAMES KENNEDY, sworn on behalf of plaintiff, testified as follows:

I am 37 years old; reside at Meckling and have resided there six years; was acquainted with deceased, John Elliott. At the time of the accident we were taking out a rail on the main track and replacing the same with a new rail; had the rail we was taking out of the main track on a hand car and had pushed the hand car and rail onto the side track, waiting for the arrival of No. 12 freight. The next thing I saw was Mr. Conley jumping off at the switch and

turned the switch. We commenced pushing the hand car out of the way of the approaching car that was coming onto the side track. We commenced pushing, and the next thing I heard Mr. Elliott holler; I thought it was him. I turned half ways around and saw Elliott standing about 12 feet west of the car-house, looking towards me like. I went to pushing the hand car, and the next thing I was knocked down by a box car. When I recovered I went onto the track and found Elliott under the cars, dead; helped to take him out and remove him into the depot and wash and clothe him. Elliott was my foreman. I was working on the section. (Witness shown Exhibit A.) When Elliott hollered to me he was 10 or 12 feet west of the car-house. At that time I was right opposite, on the side track, right across from him. That is the point where he was when he hollered to me (indicating on the plat). If he was ten feet west of the car-house he would be about there. I should judge it was about ten feet from where we started with the hand car where I was struck by the car. Conley was conductor of that train. When Elliott hollered to me I understood it that he said hurry up; that they were going to run into me. That is the way I understood it. He was standing on the south side of
16 the main track. Jens Hansen was with me, pushing the hand car along to get it out of the way of the switch. I first knew that they were sending these cars on the side track when they were pretty nigh the depot. I began to push the car away. The train was coming from the west. They made what I should call a flying switch, to the best of my judgment. Part of the train came down the main track with the engine and part came in on the side track and another part came on the main track. The last part was the part that struck Elliott. I saw the train after it struck him. I helped get him out from under the cars. It was the last section that struck him—the last part on the main track. The first part was on the main track and the middle part was sent off on this side track. No damage was done by this flying switch that struck my car, only it knocked me and another man down. The other man was kinder stunned a little. I was hurt a little, but not much. I never counted the cars that were in this last section of the flying switch that went on the main track. I think there was one on the side track that struck me. That is all that I recollect. I saw a brakeman on the side track. I saw no other brakeman. The one I saw was on the car that come onto the side track.

Cross-examination:

At the time I speak of being struck I was on the side track, on the north side of the main track. I was struck by one car that was cut in at the west end of the switch—west end of the yard. I should judge only one was cut in. That is all I know anything about. I could not say whether there was one or two cars cut in there. The brakeman's name that was on the car that came towards me is Welch. Prior to the time I was struck I was pushing a hand
17 car east to get it out of the way of the car coming down the side track. I pushed it about ten feet, I think, to the best of

my knowledge. The hand car was sent about 30 feet by being struck by the box car. It knocked it ahead about 30 feet. There was one rail on the hand car. When I thought some one called to me I turned kind of half ways around. I saw Elliott nearly opposite me, a little west, if anything. I was just about across from the car-house; across the track; somewhere along there. I saw nothing of the hind end of the train coming down; did not notice it at the time. I saw the front part of the train when it pulled down past the depot and past where I was. There was no coach attached to the front part that pulled past me. It was a freight train that ran east from Yankton in the morning. This was in the forenoon. I had been working for the company at that time about four years; could not say how long Elliott had been in the employment of the company. I had known of his being in the employ of the company about five years as section foreman there at that station.

Redirect examination:

I had worked with Mr. Elliott about three or four years before he was killed—under him. I think I had opportunity for knowing whether he was a careful man or not.

Q. You may state whether Mr. Elliott was careful or careless in guarding himself and employés against injury from the passage of trains while you knew him.

(Objected to as incompetent, immaterial, and irrelevant and as calling for the opinion of the witness. Objection sustained and plaintiff duly excepted.)

18 Q. Was he careful as men generally are or more careful?

(Objected to as incompetent, immaterial, and irrelevant and as calling for the opinion of the witness. Objection sustained and plaintiff duly excepted.)

H. C. SMITH, *sown* for plaintiff, testified as follows:

My age is 26. I reside at Meckling, and have resided there five years this fall; am track foreman on the railroad; have been such nearly two years; ever since the death of Elliott. I was acquainted with Elliott; worked under him in his gang about seven months. I was present the morning this accident occurred. Just before the accident Elliott and I were talking about 25 feet west of the car-house, before the train came down, and when the engine went by us I started west and he started east. He got as far as 10 or 15 feet from the car-house, when he stepped across the track; I should judge that is about as far as he got, as I can notice. I went west towards the depot. I did not go on the depot platform until I looked around and saw a man under the train. I did not know it was him at the time. I did not see him struck. I saw the hand car on the side track before the engine came down with the first part of the train. I did not see it struck. I saw where it stopped (indicating on Exhibit A). When Elliott and I were talking we were not on the track; we were on the south side, four or six feet from the track. I mean that he crossed from the south side to

the north side. I saw him cross the south rail. I did
19 not pay any attention whatever. I thought he got across all right. The train was opposite me then. I was about here (indicating on Exhibit A a point west of A). The hind end of the train was passing then. I should judge it was about 90 feet from where I was as the train passed me to where he was—where I saw him crossing the track. I first saw the conductor on the platform. He went down then to where Elliott was under the cars. At this time I was just on the first steps of the depot platform when Conley passed me to go down to Elliott. We did not go down together. He went down before me; got there before I did. I did not notice any brakeman. I could not say whether I noticed any brakeman on the car that struck the hand car. I might. I would not say. I saw no brakeman on this last section of the train that passed by me. I could not say how many cars there were in that. I don't know whether Elliott kept copies of the time-table and rules and regulations. This section was going a good, fast walk when it went by me. I could not say how near I was to the depot when the last part of the train passed. I kept going right along until I came to the depot. When I first knew that he was struck I was about 10 or 12 feet east of the highway crossing when I looked around and saw a man under the train. I did not know it was him at the time. I first knew of it when I was right on the steps. I heard Conley say, "There is a man killed." That was when I first knew there was a man that was hurt. At that time the train was passing me. It was not clear past; the rear part of it was not.

Q. Was Mr. Elliott a careful or a careless man in guarding himself and employés from danger from passage of trains?

20 (Objected to as incompetent, immaterial, and irrelevant. Objection sustained, and plaintiff duly excepted.)

A. Well, that is hard to tell. He appeared to be careful.

Q. A very careful man or ordinarily so?

(Objected to as incompetent, immaterial, and irrelevant. Objection sustained, and plaintiff duly excepted.)

A. Ordinarily careful. I did not talk with Mr. Berg on the platform. I don't recollect whether it was on the platform when I saw him first or not. It is the custom of the company to furnish a time-table and rules and regulations to the foreman and sectionmen.

Cross-examination:

This accident was a little after eight o'clock in the morning. It was a clear morning. There was nothing on the track there to obstruct the view from where I and Elliott stood by the track. At the time we were standing there I knew this train was in or about in. While I was standing there with Elliott the front part of the train pulled past me down to the east. I did not notice any cars attached to the engine in the front part. I would not be positive of that. I recollect two cars set in on the side track. I don't know what the men on the hand car were doing while Elliott and I were

standing there. I did not notice them doing anything during that time. Just before that I was running with the section force at that time. I had another man in my place that day. I belonged with the force. I was going away that day and was talking with Elliott just before leaving to go down and get on the train. The first that I noticed of the rear end of the train coming down the track was just as it run in on the switch, coming in on the main
21 track, the rear end of it, after the cars went in on the side track, as I turned and left Elliott to come up towards the depot. It was about opposite the depot when I started to go west. As I went west towards the depot it came down the track and immediately passed me. The last I saw of Elliott before the accident happened was when I turned to look and he was just in the act of stepping over the south rail. At that time he was across the south rail. I saw him. He was stepping across. At that time I was about 10 or 15 feet from where I was talking with him. The last I saw of Elliott he was stepping across the rail. At that time the train must have been most down to Elliott. I should judge the car was about 25 or 30 feet from Elliott when he crossed the rail. The last I saw of Elliott before the accident was at that time. This was the front car of the rear part of the train. It was on the main track. South of the depot, right down the highway, is Mr. Taylor's store. It is 75 or 90 feet from the depot. Still on beyond that, south from the depot, away from the depot, is a yellow dwelling-house. Mr. Brink was living there at the time. This side track was not what is known as a spur siding.

CHARLES M. TAYLOR, sworn on behalf of plaintiff, testified as follows:

I am now station agent at Meckling. There was no agent there then. I saw the train come in that morning and saw the flying switch that was made. I could not tell exactly the number of cars in the train or the number of cars in each part. I did not take particular notice. As near as I can recollect there were some 8 or 10 cars in the front part—quite a little train. Two cars went on the side track. Then I think five cars were in the rear part.
22 That would be my judgment. We were all considerably excited that morning and afterwards did not count the cars. I don't recollect the number of cars that I testified upon the coroner's inquest that were in the train at that time. To the best of my recollection there were five cars in the rear part of the train. There might have been four. I was in the habit of receiving time-tables, signals, rules, and regulations from the company. They were sent to me as postmaster at that time. I stuck them up where they could be seen. I kept a store at that place. There was no more than one store in town at that time. I had known Elliott about 15 years; had known of his working on the track for quite a number of years. He has worked on the track, more or less, for, I should think, ten years. I had no particular opportunities for knowing whether he was careful or careless in his work. I was around there and saw him to work. I don't know as I would have any

chance to know about his protecting himself and men from injury in the passage of trains any more than any other neighbor around there.

Cross-examination:

There were at that time no buildings between the depot and car-house shown on the map here about 200 feet east of the depot. The ground there is level, the whole station ground. It is pretty near level for six miles west and four miles east. It is level, you might say, all the way, only one foot between there and Gayville, six miles. The road is straight for about six miles west. Standing down here by the car-house looking west the grounds are level, plain to be seen. There is nothing to interrupt the view from the car-house up above the west switch. It was a pleasant morning; don't recollect whether it was sunshine or cloudy. We could see all
23 around; a good bright morning.

ELWIN A. BRINK, sworn for plaintiff, testified:

My age is 37; I reside at Meckling; have resided there two years and a half. I was at the Taylor house the morning this accident occurred—that is, the one south of the store.

(DEF'T'S COUNSEL:) The store is 67 feet south of the depot and 63 feet south of the store is the yellow house where Brink was standing when this accident occurred.

I did not see the switch made that morning. I saw the last part of the train as it came east of the depot. Of course, it would be a hard matter to tell how fast it was going. I should think that I could walk as fast as that was going; perhaps would have to walk more than ordinarily fast; quite a fast walk, I should think. I did not see Elliott struck. The car-house was between me and where he was at the time he was struck.

Cross-examination:

I did not see him any time before he was struck. (Witness shown Exhibit A.) Here is the depot (indicating). I was standing southwest a little, at the yellow house. When I saw Elliott I was standing on the steps at the south door. He was near the car-house; west of it, I should think. He was somewhere in here (indicating), near the track. I could not tell just how near; I should say nearer the car-house. The first part of the train had passed. I saw him when he left that position. He started in the direction of the car-house, down this way (indicating east). I did not watch him particularly; he went out of my sight. That is the last I saw of him until I saw him under the cars. I saw him under the cars a
24 little east of the car-house. I could not tell just how far. I should think from ten to 30 feet east of the car-house. When I saw him start away from this point the rear part of the train was just coming into my sight past the depot. It was coming down across the highway about there (indicating). When he started I could see the forward part of the train and the forward part of the rear part of the train coming down by the depot over the crossing.

I could not say positively that I saw the whole of the hind part come down. I saw it all down there, but not while I was standing there. There were 5 or 6 cars in the rear part. (To the court:) The last I saw of Elliott alive was after leaving about this point, going in this direction (indicating on map the point and an easterly direction). I saw him under the train. I could not tell you how he was run over. He was rolled up in a heap and near the south rail. I helped to take him out and carry him to the depot. I could not tell exactly how many wheels had passed over him. I should think one or two cars or a little more, perhaps, before they came to a full stop. He was under the rear end of the second car or the fore part of the third one.

HENRY C. CONLEY, sworn for plaintiff, testified:

My age is 32; my business is conductor for the Chicago, Milwaukee & St. Paul. I was conductor of the freight train on the day this accident occurred. I did not see Mr. Elliott until after he was killed. The first section of the train had 18 cars and the engine; two cars went in on the side track and two remained in the rear section. I attended to the switch myself. I had two brakemen, one on the fore section and one on the section that went in on the side track.

25 Cross-examination:

I attended to the switch myself, making a flying switch; of course I pulled the pin on the two cars on the side track and I remained on the first section until it came to the switch and jumped off and turned the switch. I also turned it back and got onto the rear section and stopped it. I got on the rear part of the section that went on down the main line and set the brakes on that. I set the brakes between the caboose and the coach. The train was going at the time it passed the switch about as fast as a man could run; that was before any brake at all was set. I set two brakes. The effect of setting those brakes was they stopped the cars a little above the depot—that is, the rear section. The rear section stopped east of the depot. The rear section consisted of four cars; flat car ahead, box car, caboose, and coach. The freight cars were about 30 feet long; the caboose was 30 feet, and the coach between 40 and 45 feet. I should think there would be about two feet space between the cars occupied by bumpers and coupling pins. I first knew of the accident after we stopped; that is the time I first saw Elliott. After I got off the coach on the north side I saw Hansen and Kennedy; they were there raising up; just getting up from falling down. I says, "What is the trouble?" At that Brakeman Welch pointed under the car; Welch was getting off from the top of the two cars that went on the side track; he was just getting down or he might have been on the ground, just down. That was the first I saw of Elliott. I had not seen him until Welch pointed to him under the train; he was fastened under the second wheel of the front end of the coach, the front trucks on the south side; the wheel was on a part of his clothing. A flying switch is made by

26 headway; the train, of course, is in motion. We cut off the hind cars which we intend to pull in; the engine starts them up, and then we cut off ahead, and *that* she starts off as the first section, and then the second section is independent of that section that went onto the side track. The result of that is you run the head section fast enough to get away from the section that is going on the side track and pull it down across the switch, and a man standing at the switch throws it so these two cars when they come in pass on the side track; then the rear end is coming still slower than these two are; they have passed the side track, and the result is that they will come along and pass down the main track. The switch is on the north side of the track. I turned the switch after the front part of the train had passed that switch to let the two cars on the side track. After these two were on I turned it back for the hind end of the train to pass down the track, and as it came along I got onto the front end of the caboose. I walked through the caboose; I took up slack on the front end. In taking up slack of a brake it gives it more purchase—holds more. By taking up the slack on one end it partly sets the brake on one end; then put it on the other and it has more effect; it bears tighter to the wheel. I set up the slack and put the brakes on the rear end of the caboose and the front end of the coach. This flying switch was accomplished at the time the two cars were on the side track and the rear end past the switch. It was completed; then there was nothing more than as though we had cut off from the train and pulled down to the lower end of the depot grounds and left the hind end to follow down in my charge.

Redirect examination:

27 Elliott's body was found under the coach. The coach was the last car. I could not tell just exactly how far the coach was at that time from the depot. (Witness shown Exhibit A.) The man was found here (indicating B). The coach was 45 feet long and extended 45 feet west, less about six or eight feet for the platform; it would be at least 40 feet west. The second wheel of the front end of the coach was on Elliott's clothing—he laid there—then the balance of the coach back. The coach stood very near in front of the Taylor house when the last section stopped. I saw the hand car on the side track before I made the flying switch; I saw it before I turned the switch. I could not say positively that I noticed it before I got to the switch. I noticed it before I threw the switch, so that I could have prevented it if there had not been room. The cars in coming up to the switch were in motion all the time until the switch was completed; they did not stop at all until the switch was made.

Recross-examination:

I was not carrying passengers. There had been an excursion or something, and we were taking the coach back. It was what we call a dead-head car—empty.

Mrs. BIDDENA ELLIOTT, sworn for plaintiff, testified:

My age is 48; am the wife of John Elliott; had been married 29 years. Mr. Elliott was in the habit of carrying time-tables and signals and rules of the company. He carried them with him all the time, I think. He kept them in his breast pocket all the time. I found the rules and regulations after his death among his papers. He was 54 years old at the time of his death and received $45.00 a month and boarded himself.

28 *The Deposition of Ingebright Berg, Offered in Evidence for Plaintiff.*

My name is Ingebright Berg. I am twenty-two years of age. I reside within a mile and a half of Meckling; have been there for a year. I was at the railroad station at Meckling the morning John Elliott was killed. I saw John Elliott just before the train came to Meckling; then he was at the store. We walked out together. He walked over toward the car-house and I to the depot. He was standing down there between the car-house and the depot until the train came; then when the cars came that struck him he kind of walked down; then I didn't see him until he was under the cars. Elliott was down near the car or tool house, walking east alongside of the track; can't say whether he was a little east or a little west of the car-house. At this time the front end of the rear part of the train was just passing the depot, I think, but am not certain. I saw a brakeman on the head end of the train, and think I saw one on the cars that were sent in on the side track, and did not see any brakeman on the part of the train that struck Elliott, and did not look for any. I think I saw the conductor walking from the west—from the switch—to the east to where Elliott lay after the accident, but am not certain. I saw the conductor where Elliott was after he was struck. The cars that struck Elliott were going about as fast as a man commonly walks when they passed the depot. I think there were two box cars and a coach in the part of the train that struck Elliottt, the coach being the rear car. I don't think it was a flat car that struck Elliott; only one wheel passed over Elliott; did not hear any one hello to him before he was struck or at all. Henry Smith was with me on the platform of the depot when Elliott was struck, and he had been standing there with me for three or four minutes. The conductor was on the north side of the train when I first saw him after the accident, I think, but am not certain.

29 *Defendant's Testimony.*

W. J. WELCH, sworn for defendant, testified:

I live in the province of Quebec; my age is 28; I am now farming. At the time of the accident at Meckling, when Elliot was killed, I was rear brakeman on that freight train; Conley was conductor. At the time this switch was made I was on the cars that went in on the side track. There were two cars set in on the side

track. The first I saw of Elliott he was on the main track. He was running slowly, angling on the track—crossing the track at an angle. The front end of the rear section of the train at that time, I should judge, was about half a car-length from him. As soon as I saw him I hollered to him to get off; I told him to get off the track or he would get run over. I did not have time to say it a second time when the car struck him. (To the court:) He was running the same way that the train was going.

Q. Was he looking towards the train or see it coming at all?

A. No, sir. I did not notice. This all occupied a very short time. I called to him once and did not have time to call the second time before he was struck. The other brakeman was on the head section of the train, up close to the engine. Conley was on the rear end of the train at the time the accident happened. He got on there at the switch. He was the one that was left to turn the switch after I went in on the side track; then he got onto the rear section there as it came down. I could not say whether the two cars that I was on struck the hand car that was on the side track or not. I set the brake up, the hind brake—the brake on the rear car—and
30 then ran to the brake of the head car. I had it half set and looked up to see how the rear end was coming. I saw Elliott on the track. I don't remember whether I touched a brake after that or not. I was excited. I looked back to see if the rear end was coming on the main track. My cars were ahead of the rear section, about, as near as I could judge, a car-length ahead of the rear section. (Witness shown Exhibit A.) I was on the side track about here (indicating). That would be 40 or 50 feet west of the car-house. I could not say about where Elliott was when he was struck. I was not very far away from him. He was a little east of the car-house after the accident. There was a flat car, box car, caboose, and one pair of wheels on the coach that passed over him.

Cross-examination:

When I first saw Elliott he was lying on the track. I was east of him at that time. I next saw Conley after he turned the switch up where these two men that were shoving the hand car were. He came off the rear end of the train up towards where the sectionmen were. That was the first I saw of him since he left the switch.

H. C. CONLEY, recalled for defendant, testified:

This was a regular train. I think we were a little late. I could not say. (Witness refers to Exhibit B.) We were about five minutes late—five or ten—I don't know exactly. I think we got there about 8.30. It was 8.25 or 8.30 that the accident occurred—in the forenoon. I could not say how long we had been running from Yankton to Sioux City and Elk Point at that time. We had been running between these two points as a regular thing. I think at that time we run first to Eden from Yankton and down back to Sioux City for a day's work. I had been running past Meckling for nearly two years in that way. I had known Elliott nearly
31 two years. I had been employed in railroading 14 years

and by this company four years. We had been in the habit of making what is known as flying switches at this station previous to this time. We make flying switches every day. I had no authority at all over Mr. Elliott as section foreman. I had nothing to do with the hiring or discharging of the section foreman or sectionmen.

Recross-examination:

Previous to that time we often made such flying switches as this—that is, dividing the train into three parts. We might have made them at Meckling three or four times before this accident. I remember of a number of single cases. I know of two or three cases. I am positive of a couple of cases before that that we made a flying switch at that station of this kind, dividing the train into three parts. I could not tell you how long prior to this accident we made those switches. I run there two years before that. I could not remember exactly the dates and times. I know of a couple there; maybe 4 or 5. I am sure I made two flying switches in the two years prior to that time. I cannot say that I have ever seen Elliott and the sectionmen at work at the time I made any of those previous flying switches at Meckling.

Redirect examination:

Meckling is about as large now as it was then. Right at the depot, I think, there was no material change. There was no town there at that time. There was a depot building and Taylor's store and the yellow house south of that and Taylor's house still on beyond that, further south. There was no corn crib. The main hay-press building—the elevator—was there at that time.

Thereupon the defendant rested its case.

32 *Plaintiff's Rebuttal.*

H. C. SMITH, recalled, testified: I had worked on the section eight months previous to the time of the accident. I had not known of a flying switch being made there at Meckling until that one.

JAMES KENNEDY, recalled, testified: I had worked on the section there at Meckling previous to that time about three years. I never knew of their making such a flying switch there previous to that time; not that kind. They would switch in a car or two, but not that kind of a switch.

Cross-examination:

I have seen them switch cars; I would not say whether flying switches. I have seen a flying switch made where there were three sections. That was in Minnesota. I have seen switching done at that station—Meckling. Sometimes they would take the engine along with the car and sometimes let the car loose and run it in; sometimes would take the engine with the car and let one switch

in—back in. Sometimes they cut loose one near the switch and let it in. I don't know what you would call it. They would be near the switch with the engine and car. Then they would cut loose, start the engine up, uncouple the car, and the engine would go up the main track and the car in on the side track. The rest of the train would be on the main track. It would not be in motion. There was no water tank there. I never saw the engine cut off and run to the water tank and the rear part of the train come down.

The above and foregoing is all the testimony offered or received upon the trial of said action.

[Stamped:] Supreme court of the Territory of Dakota. Filed May 14, 1889. J. H. C. Young, clerk.

33 *Motion to Direct Verdict.*

Thereupon the defendant moved the court to direct the jury to return a verdict for the defendant upon three grounds:

1st. Because there is no evidence of negligence upon the part of the defendant.

2nd. That if the evidence tends to show negligence it was the negligence of co-employés of the deceased engaged in the same general business, for which no recovery can be had under section 1130 of the Civil Code.

3rd. That the evidence shows such contributory negligence on the part of deceased as will prevent any recovery in this action.

Which said motion was then and there granted; to which ruling the plaintiff duly excepted.

The court thereupon directed the jury to return a verdict in favor of the defendant.

To which the plaintiff then and there duly excepted.

Thereupon the jury, under the direction of the court, returned a verdict in favor of the defendant.

Notice of Intention and Motion for New Trial.

Thereafter, on the 10th day of April, 1889, the plaintiff duly served upon the defendant a notice of her intention to move for a new trial in the words following, to wit:

(Title of Case.)

To R. B. Tripp, Esq., defendant's attorney:

Take notice that the plaintiff in the above-entitled action intends to move the court that the verdict of the jury herein be vacated and a new trial granted for the following causes, materially affecting the substantial rights of said plaintiff:

34 For errors in law occurring at the trial and excepted to by the plaintiff:

1st. In sustaining defendant's objections to the question- asked of

the witnesses Kennedy and Smith as to the carefulness of said deceased in his employment.

2nd. In sustaining defendant's motion to direct a verdict for defendant and in directing a verdict for the defendant.

Said motion will be made upon the minutes of the court in said action, and on the hearing reference will be had to the pleadings, exhibits, depositions, evidence, stenographic report of the testimony, and all orders of the court, the charge, records, and all other proceedings upon the trial.

Dated April 10th, 1889.

GRIGSBY & LYON,
Att'ys for Plaintiff.

And also did thereafter duly make and file her said motion for a new trial in the words following, to wit:

(Title of Case.)

Now, on this 10th day of April, 1889, comes the above-named plaintiff and moves the court, pursuant to the notice of intention heretofore given upon the minutes of the court in said action (reference being had to the pleadings, exhibits, depositions, evidence, stenographic report of the testimony, and all orders of the court, the charge, records, and all other proceedings upon the trial), that the verdict of the jury herein be vacated and a new trial granted for the following causes, materially affecting the substantial rights of said plaintiff:

For errors in law occurring at the trial and excepted to by the plaintiff, to wit:

I. In sustaining defendant's objections to the questions asked of the witnesses Kennedy and Smith as to the carefulness of
35 said deceased in his employment.

II. In sustaining defendant's motion to direct a verdict for the defendant and in directing a verdict for the defendant.

GRIGSBY & LYON,
Attorneys for Plaintiff.

Which said motion was, by consent of the parties, argued before said court, at Sioux Falls, in said Minnehaha county, on the 10th day of April, 1889, and after hearing argument of Grigsby & Lyon, in support of said motion, and R. B. Tripp, in opposition thereto, the same was then and there overruled; to which ruling of the court the plaintiff then and there duly excepted, and her said exception was by the court duly allowed.

And because the foregoing matters are not of record herein the same are made a part thereof and included in this bill of exceptions, which, being examined, has been found conformable to the truth and has been signed by the judge of said court this — day of April, 1889.

FRANK R. AIKENS, *Judge.*

It is hereby stipulated and agreed that the foregoing is a correct bill of exceptions, and we consent that the same be allowed and certified by the judge.

GRIGSBY & LYON,
Attorneys for Plaintiff.
R. B. TRIPP,
Attorney for Defendant.

[Stamped:] Supreme court of the Territory of Dakota. Filed May 14, 1889. J. H. C. Young, clerk.

[Endorsed:] District court, Minnehaha county. Biddena Elliott, widow of John Elliott, deceased, plaintiff, *vs.* Chicago, Milwaukee & St. Paul Railway Co., defendant. Bill of exceptions. Grigsby & Lyon, attorneys for plaintiff. Filed April 26, 1889. W. D. Stites, clerk.

36 TERRITORY OF DAKOTA, } ss:
County of Minnehaha, }

District Court, Fourth Judicial District.

At a regular term of the district court within and for the said county of Minnehaha, in the fourth judicial district of the Territory of Dakota, held at the court-house, in the city of Sioux Falls, on the — day of April, A. D. 1889.

Present: The Honorable Frank R. Aikens, presiding judge, and the officers of said court.

BIDDENA ELLIOTT, Widow of John Elliott, Deceased, Plaintiff,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant.
} Judgment for Defendant at Trial.

This action having been tried by a jury at a district court held at the court-house, in the city of Sioux Falls, in and for said county, on the 10th day of April, A. D. 1889, before the Hon. Frank R. Aikens, and the jury having returned a verdict for said defendant and against said plaintiff therein, and said verdict having been entered in the minutes of said court—

37 Now, on motion of R. B. Tripp, defendant's attorney, it is considered and adjudged by the court that said plaintiff's action be dismissed, and that the defendant recover its costs and disbursements, fixed by consent at eighteen dollars.

Done in open court this 26th day of April, 1889.

FRANK R. AIKENS, *Judge.*

Attest: W. D. STITES, *Clerk.*

Filed April 26, 1889, at 3 o'clock p. m.

W. D. STITES, *Clerk.*

[Stamped:] Supreme court of the Territory of Dakota. Filed May 14, 1889. J. H. C. Young, clerk.

[Endorsed:] District court, fourth judicial district, county of Minnehaha. Biddena Elliott, widow of John Elliott, deceased, plaintiff, *vs.* Chicago, Milwaukee & St. Paul Railway Company, defendant. Judgment-roll at trial. Filed April 26, 1889. W. D. Stites, clerk.

38 834—*Notice of Appeal* Supreme to *Court.*

TERRITORY OF DAKOTA, }
County of Minnehaha, } *ss:*

District Court, Fourth Judicial District.

BIDDENA ELLIOTT, Widow of John Elliott, Deceased, Plaintiff and Appellant,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant and Respondent.

To R. B. Tripp, Esq., attorney for the above-named defendant & respondent, and to W. D. Stites, Esq., clerk of said district court:

Please take notice that the above-named plaintiff and appellant appeals to the supreme court of the Territory of Dakota from the judgment of the said district court, entered herein on the 26th day of April, A. D. 1889, dismissing plaintiff's action and recovered by the defendant against the plaintiff for eighteen dollars, costs & disbursements, and from the whole and every part of said judgment said plaintiff & appellant designates the order denying plaintiff's motion for a new trial herein for review by said supreme court.

Dated this 8th day of May, A. D. 1889.

M. GRIGSBY & BAILEY, DAVIS & LYON,
Attorneys for Plaintiff & Appellant.

[Endorsed:] District court, Territory of Dakota. Biddena Elliott, widow of John Elliott, deceased, plaintiff & appellant, *vs.* Chicago, Milwaukee & St. Paul R'y Co., d'f't & respondent. Notice of appeal to supreme court. M. Grigsby & Bailey, Davis & Lyon, attorney-for appellant, Sioux Falls, D. T. Transcript must be filed next term after appeal taken. 130 U. S., p. 874, L. ed. Due service of the within notice of appeal by copy admitted this 11th day of May, 1889. W. D. Stites, clerk.

Due service by copy of the within notice of appeal admitted this 9th day of May, 1889, at Yankton, D. T.

R. B. TRIPP,
Attorney for Defendant & Respondent.

[Stamped:] Supreme court of the Territory of Dakota. Filed May 14, 1889. J. H. C. Young, clerk.

39 *Undertaking on Appeal, Supreme Court.*

TERRITORY OF DAKOTA, } ss:
County of Minnehaha, }

In District Court, Fourth Judicial District.

BIDDENA ELLIOTT, Widow of John Elliott, Deceased, Plaintiff & Appellant,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant & Respondent.

Whereas, on the 26th day of April, 1889, in the district court within and for the county of Minnehaha, the above-named respondent recovered a judgment against the above-named appellant, dismissing plaintiff's action and for eighteen dollars disbursements and costs;

And the above-named appellant, feeling aggrieved thereby, intend- to appeal therefrom to the supreme court of the Territory of Dakota:

Now, therefore, we do hereby undertake that the said appellant will pay all costs and damages which may be awarded against her on said appeal, not exceeding two hundred and fifty dollars.

Dated April 29th, 1889.

MRS. BIDDENA ELLIOTT.
GEO. T. BLOCKMAN.
F. L. BLOCKMAN.

TERRITORY OF DAKOTA, } ss:
County of Minnehaha, }

On this 8th day of May, in the year one thousand eight hundred and eighty-9, before me, W. H. Lyon, a notary public in and for said county and Territory, personally appeared Geo. T. Blockman and F. L. Blockman, known to me to be the persons who are described in and who executed the foregoing instrument, and severally acknowledged to me that they executed the same.

[SEAL.] W. H. LYON,
Notary Public.

T. OF DAKOTA, } ss:
County of Minnehaha, }

Geo. T. Blockman & F. L. Blockman, being duly sworn, say, each for himself, that he is one of the sureties above named; that he is a resident and freeholder of Minnehaha county, Dakota Territory, and worth the amount of two hundred & fifty dollars, specified in the foregoing undertaking, above his debts and liabilities and exclusive of his property exempt from execution, and that his place of residence is the city of Sioux Falls, in said Minnehaha county.

GEO. T. BLOCKMAN.
F. L. BLOCKMAN.

Subscribed and sworn to before me this 8th day of May, 1889.
[SEAL.] W. H. LYON,
Notary Public.

[Stamped:] Supreme court of the Territory of Dakota. Filed May 14, 1889. J. H. C. Young, clerk.

[Endorsed:] District court, fourth judicial district, county of Minnehaha, Dakota. Biddena Elliott, widow of John Elliott, deceased, *vs.* Chicago, Milwaukee & St. Paul Railway Company. Undertaking on appeal to supreme court. I hereby approve the within undertaking and the sureties therein named. Dated May 8, A. D. 1889. W. D. Stites, clerk. Filed May 11, 1889. W. D. Stites, clerk.

Due service by copy of the within undertaking admitted at Yankton, D. T., this 9th day of May, 1889.
R. B. TRIPP,
Att'y for Resp'd't.

40 TERRITORY OF DAKOTA, } ss.
County of Minnehaha. }

In District Court, 4th Judicial District.

BIDDENA ELLIOTT, Widow of John Elliott, Deceased, Plaintiff,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO., Def't. } Stipulation.

It is hereby stipulated & agreed that the above-entitled case shall be tried on appeal at the May, 1889, term of the supreme court of this Territory without the necessity of printing briefs or abstracts. Either party may use the abstracts & briefs had on the former appeal if he deems proper, with the right to such amendments or additions thereto as he may desire & as shall be lawful.
GRIGSBY & LYON,
Att'ys for Plaintiff.

Dated April 20, 1889.

The defendant agrees to the above, without waiving, however, the giving by appellant such bond as is required by law.
R. R. TRIPP,
Att'y for Defendant.

Filed May 11, 1889.
W. D. STITES, *Clerk.*

[Stamped:] Supreme court of the Territory of Dakota. Filed May 14, 1889. J. H. C. Young, clerk.

41 TERRITORY OF DAKOTA, } ss:
County of Minnehaha, }

In District Court, 4th Judicial District.

BIDDENA ELLIOTT, Widow of John Elliott, Deceased, Plaintiff and Appellant,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant & Respondent.

Upon presentation of the annexed stipulation in the above-entitled action it is ordered that the appeal in said action be heard at the May, 1889, term of the supreme court, and that no briefs or abstracts need be prepared, and that either party may use the abstracts & briefs had in the former appeal, if he deems proper, with the right to such amendments or additions thereto as he may desire and as shall be lawful. It is further ordered that the clerk of said court send up to the supreme court the original judgment-roll, and that no copy or transcript thereof need be made.

By the court:

FRANK R. AIKENS, *Judge.*

May 10, 1889.

Filed May 11, 1889.

W. D. STITES, *Clerk.*

[Stamped:] Supreme court of the Territory of Dakota. Filed May 14, 1889. J. H. C. Young, clerk.

42 TERRITORY OF DAKOTA, }
County of Minnehaha. }

In District Court, Fourth Judicial District.

BIDDENA ELLIOTT, Widow of George Elliott, Deceased, Plaintiff,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant.

I, Frank R. Aikins, judge of the district court of fourth judicial district of the Territory of Dakota within and for Minnehaha county, do hereby certify that the foregoing papers, viz., summons, complaint, answer, verdict, bill of exceptions, notice of intention and motion for new trial and order denying same, and copy of the judgment, are contained in and constitute the judgment-roll in the above-entitled action and the whole of such judgment-roll.

FRANK R. AIKENS, *Judge.*

May 10th, 1889.

[Stamped:] Supreme court of the Territory of Dakota. Filed May 14, 1889. J. H. C. Young, clerk.

43 TERRITORY OF DAKOTA, } ss:
County of Minnehaha, }

In District Court, Fourth Judicial District.

BIDDENA ELLIOTT, Widow of John Elliott, Deceased, Plaintiff, }
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant. }

I, W. D. Stites, clerk of the district court of the fourth judicial district of the Territory of Dakota within and for the county of Minnehaha, do hereby certify that the foregoing are the original papers, to wit, the notice of appeal, undertaking given thereon, with proofs of service, the judgment-roll, and the certificate of the judge, in the above-entitled action, wherein Biddena Elliott, widow of John Elliott, deceased, was plaintiff and Chicago, Milwaukee & St. Paul Railway Company defendant, as the same appear of record in said court.

The original papers herein are sent up in pursuance of an order of the Hon. Frank R. Aikens, judge of said court, dated May 10, 1889, which order, with stipulation annexed, is attached hereto and included with the foregoing papers.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 11th day of May, 1889.

W. D. STITES, *Clerk.*

[Stamped:] Supreme court of the Territory of Dakota. Filed May 14, 1889. J. H. C. Young, clerk.

44 (File No., 518.)

THE UNITED STATES OF AMERICA, } ss:
Territory of Dakota, }

In the Supreme Court.

Appeal from the district court of Minnehaha county.

BIDDINA ELLIOT, Widow of John Elliot, Deceased, Plaintiff and Appellant, }
vs. } May Term, A. D. 1889.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant and Resp'd't. }

This action coming on to be heard at the May, A. D. 1889, term of this court, at the supreme court room, in the city of Yankton, Territory of Dakota—present, Bartlett Tripp, chief justice, and William B. McConnell, Charles M. Thomas, James Spencer, Roderick Rose, Charles F. Templeton, Louis W. Crofoot, and Frank R. Aikens, associate justices—and the appeal herein having been su-mitted without argument, and the court having advised thereon,

it is now here considered, ordered, and adjudged that the judgment of the said district court within and for said Minnehaha county, appealed from herein, be, and the same is hereby, affirmed.

And it is further ordered that this cause be, and it is hereby, remanded to the district court for further proceedings according to law and the judgment of this court.

And it is further considered and adjudged that respondent have and recover of the appellant costs and disbursements on this appeal expended, taxed and allowed at —.

By the court:

BARTLETT TRIPP,
Chief Justice.

All the justices concurring except Aikens, J., not sitting.

[Endorsed:] File No., 518. In supreme court, Territory of Dakota, May term, 1889. Biddena Elliot, widow of John Elliot, deceased, plaintiff and appellant, *vs.* Chicago, Milwaukee & St. Paul Railway Company, defendant and respondent. Filed in open court this 31 day of May, 1889. J. H. C. Young, clerk. Remittitur sent down — ——, 1889.

45 In—

BIDDENA ELLIOTT, Widow of John Elliott, Deceased, Plaintiff and Appellant,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant and Respondent.

Appearance entered and taxation of costs waived.

R. B. TRIPP,
Attorney for Respondent.

[Stamped:] Supreme court of the Territory of Dakota. Filed Oct. 19, 1889. J. H. C. Young, clerk.

46 In the Supreme Court of the United States.

BIDDENA ELLIOTT, Widow of John Elliott, Deceased, Plaintiff in Error,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant in Error.

TERRITORY OF DAKOTA, *County of Minnehaha,* } *ss:*

W. H. Lyon, being first duly sworn, says that ever since the action was begun he has been one of the attorneys for the plaintiff in the case of Biddena Elliott, widow of John Elliott, deceased, plaintiff & appellant, *vs.* Chicago, Milwaukee & St. Paul Railway Company,

defendant and respondent, lately decided in the supreme court of Dakota Territory, and in which a suit of error is now prayed for by said plaintiff; that the amount in controversy in said action exceeds the sum of five thousand dollars and is the sum of fifteen thousand dollars.

That on September 14th, 1886, said cause was tried by a jury at district court in and for Clay county, in said Territory, and a verdict was by them rendered for the sum of seven thousand dollars in favor of said plaintiff and against said defendant.

W. H. LYON.

Subscribed and sworn to before me this 18 day of October, 1889.

W. H. WILSON,
Notary Public, Dakota.

[SEAL.]

[Stamped:] Supreme court of the Territory of Dakota. Filed Oct. 19, 1889. J. H. C. Young, clerk.

47 Copy.

UNITED STATES OF AMERICA, *Territory of Dakota*, } ss:

To the honorable justices of the Supreme Court of the United States:

And now comes Biddena Elliott, widow of John Elliott, deceased, of the Territory of Dakota, by M. Grigsby and Bailey, Davis & Lyon, her attorneys, and complains that in the record and proceedings and also in the rendition of a judgment in a suit between said Biddena Elliott, widow of John Elliott, deceased, plaintiff and appellant, and Chicago, Milwaukee & St. Paul Railway Company, defendant & respondent, in the supreme court of the Territory of Dakota, being the highest court of law or equity of the said Territory in which a decision could be had in said suit, and in which a final judgment was rendered against her on the 31st day of May, A. D. 1889, wherein said court erred in affirming the judgment of the district court of the Territory of Dakota in and for the county of Minnehaha in said action and in refusing to grant a new trial therein, all which appears in the record and proceedings in said suit, manifest error hath happened, to the great damage of said Biddena Elliott, widow of John Elliott, deceased.

Wherefore she prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

Dated October 18, 1889.

M. GRIGSBY AND
BAILEY, DAVIS & LYON,
Attorneys.

Allowed.
BARTLETT TRIPP,
Chief Justice Sup. Court of Dak. Ter.

[Stamped:] Supreme court of the Territory of Dakota. Filed Oct. 19, 1889. J. H. C. Young, clerk.

48 In the Supreme Court of the United States, October Term, 1890.

BIDDENA ELLIOTT, Widow of John Elliott, Deceased, Plaintiff in Error,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant in Error.

Assignment of Errors.

The plaintiff in error herein says there is manifest error in the face of the record in this:

I. In affirming the judgment of the district court of the fourth judicial district of the Territory of Dakota in and for Minnehaha county.

II. In refusing to grant a new trial in said action.

III. That the supreme court of the Territory of Dakota erred in affirming the judgment of said district court and in refusing to grant a new trial in said cause for the following reasons, viz:

1. Said district court erred in sustaining defendant's objection to the questions asked of the witnesses Kennedy and Smith as to the carefulness of the deceased in his employment.

2. Said district court erred in sustaining defendant's motion to direct a verdict for the defendant and in directing a verdict for the defendant.

3. Said district court erred in denying plaintiff's motion for a new trial.

Wherefore the above-named plaintiff in error prays that the judgment of the supreme court of the Territory of Dakota be reversed and a new trial ordered herein.

M. GRIGSBY AND
BAILEY, DAVIS & LYON,
Attorneys for Plaintiff in Error.

[Stamped:] Supreme Court of the Territory of Dakota. Filed Oct. 19, 1889. J. H. C. Young, clerk.

49 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Dakota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, between Biddena Elliott, widow of John Elliott, deceased, plaintiff in error, and The Chicago, Milwaukee & St. Paul Railway Company, defendant in error, a manifest error has happened,

to the great damage of the said Biddena Elliott, widow of John Elliott, deceased, plaintiff in error, as by her complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that
50 you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Jus-
[SEAL.] tice of the said Supreme Court, the 19th day of October, in the year of our Lord one thousand eight hundred and eighty-nine.

JAMES H. C. YOUNG,
Clerk of the Supreme Court, Territory of Dakota.

Allowed by—
BARTLETT TRIPP,
Chief Justice Sup. C't Dakota.

[Stamped:] Supreme court of the Territory of Dakota. Filed Oct. 19, 1889. J. H. C. Young, clerk.

50½ UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Dakota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, between Biddena Elliott, widow of John Elliott, deceased, plaintiff in error, and The Chicago, Milwaukee & St. Paul Railway Company, defendant in error, a manifest error hath happened, to the great damage of the said Biddena Elliott, widow of John Elliott, deceased, plaintiff in error, as by her complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 19th day of October, in the year of our Lord one thousand eight hundred and eighty-nine.

Seal Supreme Court of Dakota Territory.

JAMES H. C. YOUNG,
Clerk of the Supreme Court of the Territory of Dakota.

Allowed by—
BARTLETT TRIPP,
Chief Justice Sup. C't Dakota.

[Endorsed:] Writ of error.
[Stamped:] Supreme court of the Territory of Dakote. Filed Oct. 19, 1889. J. H. C. Young, clerk.

51 The United States of America to Chicago, Milwaukee & St. Paul Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Dakota, wherein Biddena Elliott, widow of John Elliott, deceased, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Bartlett Tripp, chief justice of the supreme court of the Territory of Dakota *of the United States*, this 19th day of October, in the year of our Lord one thousand eight hundred and eighty-nine.

BARTLETT TRIPP,
Chief Justice Supreme Court of Dak. Ter.

51½ [Endorsed:] Citation.
[Endorsed:] Service of the within admitted this 19th day of October, 1889, and copy of same received. R. B. Tripp, attorney for def't in error.
[Stamped:] Supreme court of the Territory of Dakota. Filed Oct. 19, 1889. J. H. C. Young, clerk.

52 Know all men by these presents that we, Frank L. Blackman and Geo. T. Blackman, are held and firmly bound unto The Chicago, Milwaukee and St. Paul Railway Company in the full and just sum of two hundred & fifty dollars, to be paid to the said Chicago, Milwaukee and St. Paul Railway Company, its successors, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 18 day of October, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at a supreme court of the Ter-itori*ty* of Dakota, held at the the city of Yankton, in said Ter-itori*ty*, in a suit depending in said court between Biddena Elliott, widdow of John Elliott, deceased, plaintiff and appellant, and The Chicago, Milwaukee & St. Paul Railway Company, defendant and respondent, a judgment was rendered against the said Biddena Elliott, widow of John Elliott, deceased, and the said Biddena Ellrott, widdow of John Elliott, deceased, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation, directed to the said Chicago, Milwaukee & St. Paul Railway Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Biddena Elliott, widow of John Elliott, deceased, shall prosecute said writ of error to effect and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

FRANK L. BLACKMAN. [SEAL.]
GEO. T. BLACKMAN. [SEAL.]

Approved by—
BARTLETT TRIPP,
Chief Justice Sup. C't Dakota.

[Stamped:] Supreme court of the Territory of Dakota. Filed Oct. 19, 1889. J. H. C. Young, clerk.

TERRITORY OF DAKOTA, } *ss:*
County of Minnehaha, }

On this 18th day of October, in the year one thousand eight hundred and eighty-nine, before me, J. H. Fernyhough, a notary public in and for said county and Territory, personally appeared Frank L. Blackman and Geo. T. Blackman, known to me to be the persons who are described in and who executed the foregoing instrument, and acknowledged to me that *he* executed the same.

[SEAL.] J. H. FERNYHOUGH,
Notary Public, Minnehaha Co., Dakota Ter.

TERRITORY OF DAKOTA, } *ss:*
County of Minnehaha, }

Frank L. Blackman and Geo. T. Blackman, being duly sworn, say each for himself that he is one of the sureties above named; that he is a resident and freeholder of the Territory of Dakota and worth the amount of two hundred & fifty dollars, specified in the foregoing undertaking, above his debts and liabilities and exclusive of his property exempt from execution.

FRANK L. BLACKMAN.
GEO. T. BLACKMAN.

Subscribed and sworn to before me this 18 day of October, 1889.
[SEAL.] J. H. FERNYHOUGH,
Notary Public, Minnehaha Co., Dakota Ter.

53 In—

BIDDENA ELLIOTT, Widow of John Elliott, Deceased, Plaintiff and Appellant,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant and Respondent.

Journal Entries. Filed May 14, 1889.

UNITED STATES OF AMERICA,
Territory of Dakota.

In Supreme Court, May Term, A. D. 1889.

Wednesday, May 15, 1889, being the 2d day of the term.

* * * * * * *

In—

BIDDENA ELLIOTT, Widow of John Elliott, Deceased, Plaintiff and Appellant,
vs. } 518.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant and Respondent.

On motion of Park Davis, Esq., cause placed on calendar.

* * * * * * *

Friday, May 31, 1889, being the 16th day of the term.

* * * * * * *

In—

54 BIDDENA ELLIOTT, Widow of John Elliott, Deceased, Plaintiff and Appellant,
vs. } 518.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant and Respondent.

Cause submitted to the court.

* * * * * * *

In—

BIDDENA ELLIOTT, Widow of John Elliott, Deceased, Plaintiff and Appellant,
vs. } 518.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant and Respondent.

Judgment of the district within and for Minnehaha county appealed from be, and the same is, affirmed.

55 TERRITORY OF DAKOTA, *ss:*

In Supreme Court.

I, James H. C. Young, clerk of the supreme court within and for the Territory of Dakota, do hereby certify that the above and foregoing is a full, true, correct, and complete transcript and copy of all the papers of record in the supreme court of the Territory of Dakota in the above-entitled action, wherein Biddena Elliott, widow of John Elliott, deceased, is plaintiff and appellant *vs.* The Chicago, Milwaukee & St. Paul Railway Company, defendant and respondent, as the same now remains on record in said court; that the citation herewith is the original citation, and that the abstract of the journal entries herewith is a true and correct copy of the journal entries of the supreme court of the Territory in so far as they relate to this cause.

Seal Supreme Court of Dakota Territory.

In witness whereof I have hereunto set my hand and affixed the seal of said court this first day of November, A. D. 1889.

JAMES H. C. YOUNG, *Clerk.*

Endorsed on cover: Case No. 13,966. Dakota Territory Supreme court. No. 308. Biddena Elliott, widow of John Elliott, deceased, plaintiff in error, *vs.* The Chicago, Milwaukee & St. Paul Railway Company. Filed February 15, 1890.

Office Supreme Court U. S.
FILED.
APR 29 1893
JAMES H. McKENNEY,
CLERK.

150-245

CASE No. 13,966.

Supreme Court of the United States.

OCTOBER TERM, 1892.

TERM No. 308.

BIDDENA ELLIOTT, WIDOW OF JOHN ELLIOTT, DECEASED, PLAINTIFF IN ERROR,

vs.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

MELVIN GRIGSBY, AND
DAVIS, LYON & GATES,
Attorneys for Plaintiff in Error.
SIOUX FALLS, SOUTH DAKOTA.

BROWN & SAENGER, PRINTERS, SIOUX FALLS, S. DAK.

CASE No. 13,966.

Supreme Court of the United States.

OCTOBER TERM, 1892.

TERM No. 308.

BIDDENA ELLIOTT, WIDOW OF JOHN ELLIOTT, DECEASED, PLAINTIFF IN ERROR,

vs.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

BRIEF OF PLAINTIFF IN ERROR.

HISTORY OF THE CASE.

In this action the plaintiff seeks to recover $15,000 damages for the death of her husband, a section foreman in the defendant's employ, caused by the alleged negligence of the defendant's conductor in making a flying switch. In the original trial of the case, the plaintiff recovered a verdict for $7,000. The defendant appealed and a new trial was ordered by the Territorial Supreme Court (*Elliot vs. R. R. Co.*, 5 Dak., 532) upon the grounds among others that the deceased was a co-employe of the conductor, and was also guilty of contributory negligence. The case was again tried in the lower Court upon the same evidence. At the conclusion of the testimony the defendant asked the Court to direct a verdict for the defendant upon three grounds.

First—That the defendant was not guilty of negligence.

Second—That the negligence, if any, was that of a co-employe of the deceased, and

Third—That the deceased was guilty of contributory negligence.

The defendant's request was granted and the plaintiff appealed to the Territorial Supreme Court. The case was submitted without argument and the decision of the lower Court was affirmed. Whereupon the plaintiff appealed to this Court.

SPECIFICATIONS OF ERROR.

The plaintiff specifies as error that the trial court erred in directing a verdict for the defendant and in refusing to grant a new trial, and that the Supreme Court of the Territory of Dakota erred in affirming the judgment of the trial court and in not granting a new trial.

STATEMENT OF FACTS.

The deceased was a section foreman on defendant's railway. At Meckling on November 1st, 1884, at about 8:30 o'clock A. M., he was struck and killed by defendant's cars at that place. A freight train approaching from the west was broken into three parts, making a double flying switch. The engine with eighteen cars came down the main track; the conductor then turned the switch and threw two cars down the side track; he then replaced the switch and threw the remaining four cars down the main track across a public highway, striking the deceased in the act of crossing the track. Flying switches were prohibited by the rules of the company, except at spur sidings, and this was not a spur siding. The deceased had been in defendant's employ about ten years, and always kept the rules and regulations on his person. There was no evidence that deceased had ever known of a flying switch being made at that place. The section men under the direction of the deceased had that morning been engaged in repairing the track and had pushed the loaded hand car on the side track waiting for the train. Shortly before the train came in the deceased was at the store 67 feet south of the depot. He then walked over towards the car house (200 feet east of depot) where he was talking with the wit-

ness Smith near the track, about 25 feet west of the car house. The engine and eighteen cars then passed by. In the meantime the two box cars had been thrown on the side track and were about to run into the hand car. The men, when they saw that the cars were about to be thrown down the side track had started to push the hand car east. The deceased, according to the witness Kennedy, "hollered" to them, and said "Hurry up! that they were going to run into me." At that time the deceased was south of the main track ten or twelve feet west of the car house. Almost immediately afterwards, the hand car was struck by the two box cars and knocked forward thirty feet, and the two men were knocked down and one of them stunned. The defendant's witness Welch, who was brakeman on the two box cars on the side track, last saw the deceased running diagonally across the main track towards the hand car. Almost immediately afterwards the deceased was struck and killed by the cars comprised in the last section of the flying switch running down the main track. The evidence is conflicting as to the rate of speed of the detached cars, but it is evident that in the excitement of the moment all estimates as to speed and distance must be unsatisfactory. The deceased, however, was *running diagonally across* the track when struck, and was half a car length (15 feet) in front of the cars when first seen by defendant's witness Welch *upon the track*, and was almost immediately afterwards struck by the cars. (Fol. 29.) It is evident, therefore, that the cars must have been coming at a very rapid rate in order to so quickly overtake the deceased.

There was no employe stationed on the front of the cars that struck deceased, in order to apply the brakes or give warning to any who might be upon the track. The evidence introduced by the plaintiff shows that there was no employe in or upon any of the cars that struck the deceased. Plaintiff's witness Berg, testified that he thinks he saw the conductor walk from the switch east to where Elliott was killed. (Fol. 28.) The witness Smith, an employe of the defendant, says that he first saw the conductor on the depot platform after the cars had passed, and from there he went down to Elliott. (Fol. 19.)

ARGUMENT.

I.

AS TO THE DEFENDANT'S NEGLIGENCE.

The defendant's negligence is conclusively shown by the bare statement of facts, and was not questioned by the Territorial Supreme Court in their opinion in the case. There is hardly a case to be found in the books where a flying switch was made in so reckless and hazardous a manner and with such wanton disregard of the safety of others, as is shown by the evidence in this record.

The conductor threw down the two cars upon the side track at such a rapid rate of speed that the brakeman could not stop them before they struck the hand car, over 300 feet away, and knocked down both the section men. And had it not been for the rail upon the hand car, which was undoubtedly first struck, these two men in all probability would also have been killed, and that flying switch would have resulted in three deaths instead of one. There was a rule prohibiting flying switches, upon obedience to which the section men and the public had a right to rely. Under these circumstances, if the conductor decided to take the responsibility of breaking the rules, the *very least* care he was legally and morally bound to exercise was to send those rear cars down the main track at a very moderate rate of speed, and to station an employe or himself upon the foremost cars, so as to apply the brakes and give warning to any who might be rightfully upon the track. If either of those precautions had been taken the deceased would not have lost his life. But the evidence shows that the conductor violated the rules, and threw the remaining four cars at a very rapid and dangerous rate of speed down the main track and across a traveled public highway, over which teams and travelers were constantly liable to pass, and not only failed to station an employe upon any of the moving cars, *but was not even in or upon any of those cars himself when the accident occurred.* That such conduct was negligence seems too plain for argument.

Shelby's Administrator vs. Ry Co., 85 Ky., 224.

II.

The defendant seeks to defeat a recovery in this case by charging contributory negligence on the part of the deceased,

on the ground that he did not look and listen for approaching trains before stepping on the track.

The general rule laid down by the authorities as to the degree of care which must be exercised by persons about to cross a railroad track is stated in 1 Thompson on Neg., p. 426, as follows:

"It is the duty of the traveler to look both ways, and listen for trains at a *safe distance from the railway track*."

This precaution was undoubtedly taken by the deceased. He had seen the engine with a long train of eighteen cars pass by. As the track was straight, and he was standing near it, it was impossible for him to see how many cars were in the remainder of the train, or that it had been cut into two parts. He undoubtedly saw that the switch had been turned and that the remainder of the train was apparently coming down the side track. His attention was then necessarily directed towards the removal of his hand car and the rapidly approaching freight cars upon the side track. He had not the slightest reason to suppose that the rear part of this section had been cut off and would be thrown down the main track. As soon as he saw that his men and the hand car were in danger he hallowed to his men and started to run across the track to help them. The jury were justified in drawing these conclusions from the evidence, and such is the only rational explanation of the conduct of the deceased.

Defendant's witness, Welch, testifies that the deceased was *running diagonally* across the track when struck, and was half a car length—15 feet—in front of the approaching cars when first seen by the witness on the track. It is evident, therefore, that the rear cars must have been running all the way from ten to fifteen miles an hour in order to overtake the deceased before he got across the track. But suppose that we assume that they were only running 7½ miles an hour—a very moderate estimate—that would be 660 feet per minute. From the plat it appears that the car house (near Elliott's position) was about three hundred feet from the switch, which distance the cars would run in less than half a minute. It is therefore a reasonable, and in fact the only inference from the evidence, that the deceased had been looking westward down the track up to *within less than 30 seconds before his death*, and could see no cars coming down the main

track. There is no authority for appellant's position that the deceased was obliged to look and listen *all the time*, not only while he was approaching the track, but even until he had got completely across.

In 1 Thompson on Neg., p. 404, is reprinted the leading case upon this subject (*Bonnell vs. R. R. Co.*, 39 N. J. L., 189). In that case the plaintiff, when 100 yards from the crossing, saw the train "with the rear part towards him and was deceived by appearances, supposing that it was going away from the crossing." The plaintiff did not look again in that direction, though there was nothing to obstruct his view, and when he reached the track he was struck by the train, which was running backward without signals. The defendant's claim was "that the plaintiff did not look up the track as he approached and before he attempted to cross it." The Supreme Court said:

"But the plaintiff had looked when about 100 yards from the crossing and saw, as he supposed, a train going in the opposite direction, with the rear end towards him. *He was not required by any legal rule to look continually until he crossed the track.* A man of prudence might have received a fixed impression, from the appearance of the train, that it was going away from the station."

See also

R. R. vs. Van Steinberg, 17 Mich., 99, 120, 124;
Coal Co. vs. Lear, (Pa.) 9 Atl. Rep., 267;
Ernest vs. R. R., 35 N. Y., 40;
Greany vs. R. R., 101 N. Y., 419;
R. R. vs. Hedges, 105 Ind., 398;
Plummer vs. R. R., 73 Me., 591;
Kellogg vs. R. R., 79 N. Y., 73, 76, 77.

There is no evidence that the deceased did not look and listen before approaching or even after he stepped upon the track without being able to see that the rear cars were to be thrown down the main track. On the contrary there is almost positive proof that he did look toward the switch when the cars were thrown down the side track—only a few seconds before he was struck. If, from the evidence, there was room for doubt whether the deceased looked or not, it was properly a question for the jury. Due care is always presumed unless the contrary is shown.

Continental Co., vs. Stead, 95 U. S., 165;
R. R. Co., vs. Webber, 76 Pa. St., 167.

But, even if the uncontradicted evidence conclusively showed that deceased did not look and listen, the plaintiff would still be entitled to recover upon three grounds:

(a) The great preponderance of authority is that where a traveler about to cross a railroad track has seen an engine attached to a number of cars go by, he has a right to suppose that the danger has passed, and if he then steps upon the track and is injured by detached cars running of their own momentum and without a watchman stationed thereon to give warning of the danger, then in such case the question must be submitted to the jury, whether or not the injured party, was guilty of negligence in failing to see the approaching cars.

R. R. vs. Troutman (Pa.) 6 Am. and Eng. R. R. Cas., 117.
R. R. Co. vs. Hedges, 105 Ind., 398.
Farley vs. R. R. Co., 56 Ia., 337.
Ferguson vs. R. R. Co., 63 Wis., 145.
French vs. R. R. Co., 116 Mass., 537.
Brown vs. R. R. Co., 32 N. Y., 601-3, followed in *Ryan vs. R. R. Co.*, 37 Hun., 186.

These are cases where travelers about to cross a railroad track are relieved from the rule to "look and listen." The rule itself was laid down for *travelers alone*, but when it is sought to be extended to an employe rightfully at work upon or near the track, such employe cannot be denied the benefit of the exception to the rule.

(b.) There is no evidence that the deceased had ever known of a train broken apart and thrown down the track in that manner, and he had not the slightest reason to suspect that it might be done in this case. His duty to the defendant rightfully called him upon the track and his attention was necessarily required in the direction of his men and the rapidly moving cars upon the sidetrack, and at the time he was struck he was running over to help his men, and therefore he was not guilty of negligence even if he did not "look and listen" for cars running noiselessly down the main track.

Ominger vs. R. R. Co., 4 Hun., 159.
Crowley vs. Ry. Co., 65 Ia., 658.
Butler vs. R. R. Co., 28 Wis., 501-502.

Mark vs. Ry. Co., 32 Minn., 208.
Goodfellow vs. R. R. Co., 106 Mass., 461.
R. R. Co. vs. McLaughlin, 119 U. S., 566, 573.

The section men pushing the hand car being endangered through the negligence of the conductor in making the flying switch, the deceased in attempting to save them from injury could not be held chargeable with negligence.

"The fact that the injured person did such act by which he incurred or increased danger, does not necessarily involve negligence which will prevent recovery when the danger was created by some unlawful act of the company."

Where human life is at stake no degree of negligence is culpable.

Pierce vs. Railroads, 314.
Eckert vs. R. R., 43 N. Y., 502.
Linneham vs. Sampson, 126 Mass., 506.
R. R. vs. Aulon, 58 Ala., 70.
Donahoe vs. R. R., 83 Mo., 560, 563.

Appellant's claim that Elliott was not necessarily upon the track when injured is a most unjustifiable assumption. It is well settled that in cases like the one at bar "the view of the evidence most favorable to plaintiff must be taken." The evidence tends to show that the deceased saw the imminent danger to be apprehended from the freight cars thrown down the side track, and after hallowing to the men, had started to run across the track to save them and the company's property from injury. And now to have the claim set up that the deceased was *not necessarily* upon the track, and therefore that it was *not necessary* for him to endeavor to save the men and defendant's hand car from injury, is an exhibition of ingratitude for a servant's devotion to the interests of his master, rarely witnessed even among railroad corporations.

(c.) Plaintiff's evidence tended to show that the injury was the result of wanton or willful negligence on the part of the conductor; and therefore the plaintiff was entitled to recover even if the deceased was guilty of contributory negligence.

2 Thompson on Neg., 1160, and authorities cited.

The late case of *R. R. Co. vs. Ives*, 144 U. S., 408, is, so far as the claim of contributory negligence is concerned, al-

most identical with the case at bar, and under the authority of that case it would be impossible to hold as a matter of law that the plaintiff's intestate was guilty of contributory negligence. In that case, the deceased, before driving across the defendant's track stopped about seventy-six feet from the track and probably listened for trains. A clear view could not be had until within fifteen or twenty feet of the track. When the deceased reached that point where he could have had an unobstructed view of the track, he did not look. When he got upon the track he was watching a train that had just passed and was struck and killed by another train coming from the same direction, and which he could have seen at any point within fifteen or twenty feet of the track, if he had looked.

In reply to the claim of contributory negligence on the part of the deceased, this Court said (p. 428): "As the question of negligence on the part of the defendant, was one of fact for the jury to determine, under all the circumstances of the case, and under proper instructions from the Court, so also the question of whether there was negligence in the deceased, which was the proximate cause of the injury, was likewise a question of fact for the jury to determine, under like rules. The determination of what was such contributory negligence on the part of the deceased as would defeat this action, or, perhaps, more accurately speaking, the question of whether the deceased, at the time of the fatal accident, was, under all the circumstances of the case, in the exercise of such due care and diligence as would be expected of a reasonably prudent and careful person, under similar circumstances, was not more a question of law for the Court than was the question of negligence on the part of the defendant. There is no more of an absolute standard of ordinary care and diligence in the one instance than in the other." In the case at bar the question of negligence of the defendant and contributory negligence of the deceased was submitted to the jury at the original trial, and by their verdict the jury found the defendant to be guilty of negligence and the deceased free from contributory negligence.

Whether the deceased was guilty of contributory negligence or not was for the jury and not the Court to determine. The rule as to the province of the jury in such cases is well stated in the Ives case at page 417.

"What may be deemed ordinary care in one case, may, under different circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the Court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonably prudent men, under a similar state of affairs. When a given state of facts is such that a reasonable man may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the Court."

III.

The defendant also seeks to defeat a recovery in this action on the ground that the deceased was a co-employe or fellow servant of the conductor. We contend that the fellow servant or co-employe doctrine does not apply to this case for three reasons., viz:

(a.) The deceased was, at the time and place of the accident subject to to the orders and under the immediate control of the conductor.

(b.) The conductor at the time and place of the accident was representing the company as a vice principal.

(c.) The deceased and the conductor were in different departments of service.

A.

THE DECEASED WAS AT THE TIME AND PLACE OF THE ACCIDENT SUBJECT TO THE ORDERS AND UNDER THE IMMEDIATE CONTROL OF THE CONDUCTOR.

In the Ross case, 112 U. S., 377, this Court said: "That the conductor of a railway train, who commands its movements, directs when it shall start and at what station it shall stop, at what speed it shall run, and has the general management of it and control over the persons employed upon it, represents the company and therefore, for any injuries resulting from his negligent acts the company is responsible. If such a

conductor does not represent the company then the train is operated without any representative of its owners."

We are aware that it has been claimed that the above language was used in a limited sense—that the Court only meant to say that the conductor was a "representative of the company" as to those employes who were under his control and subject to his orders.

While we do not agree with those who undertake to limit and restrict the meaning of such plain language, we claim that this case is squarely within the rule of the Ross case even under such restricted and limited interpretation. Under the rules of the company it was the duty of the deceased to hold himself in readiness at all times, to assist in the passage of trains. In case of accident or delay he must obey the orders of the conductor.

Rule 69, page 7 of the record is as follows:

"*Track foremen and their men must at all times hold themselves in readiness to aid the passage of trains, and, in case of accident or delay, will obey the orders of the conductors.*"

The evidence shows that this was a delayed train. (Fol. 30.) At the time of his death the deceased was as much bound to obey the orders of the conductor as were any of the subordinates upon the train. Whether the conductor had exercised his authority or not is immaterial. If the deceased had been a subordinate upon the train and had lost his life through the negligence of the conductor, it would certainly be immaterial whether or not, immediately prior to his death he had received express orders from the conductor, nor is the fact material that the conductor may not have been aware of Elliott's presence. The right to command Elliott's movements made him the superior of the deceased, whether he saw Elliott or not. If one of the conductor's subordinates upon the train had been injured through his negligence, the company could not relieve itself from liability by showing that the conductor was not aware of the presence of the injured party. The fact of the subordination to the conductor rendered the defendant liable, and it is unquestionably immaterial whether the deceased was a subordinate for five minutes or five years. These considerations bring the case above squarely within the Ross case in every respect.

B.

VICE PRINCIPAL THEORY.

Since the decision in the Ross case, many Courts of great learning in well reasoned decisions, claiming to follow the rules laid down in that case, have held that the conductor of a train is the representative of a company as a general proposition, and that he is not the fellow servant of the other employes of the company, whether they are subject to his control or not.

Prominent among such decisions is that of SHIRAS, J., in *Ragsdale vs. R. R. Co.*, 42 Fed., 383.

In that case the fireman on one train was injured by the negligence of the *conductor* of *another train*. The conductor was in charge of train No. 1, the fireman was on the engine of 181. In his discussion of the Ross case, the learned Judge says: "The Supreme Court holds that the conductor, having the control and management of the running of the train, is to be deemed to be the representative of the company, and not a fellow servant with the engineer and other employes on that train. So far as the running and management of the train under his control is concerned, does he cease to occupy such representative capacity under any circumstances? Suppose in the collision in question the fireman upon train No. 1 had been injured as well as the plaintiff, and both had brought suit to recover for the injuries received. Under the rule laid down in the *Ross case*, the Court would be required in the one case to instruct the jury that the conductor in charge of train No. 1 was, by reason of the nature of his employment in connection with the train, the representative of the company, for whose negligence the master would be liable. Upon what theory could the Court in the next case charge the jury that in the running and management of the train the conductor was not the representative of the company, but was in fact a fellow servant with the empioyes upon the other train?".

In *Daniel vs. Ry. Co.*, (W. Va.) 15 S. E. Rep., 162, HOLT, J., in an elaborate opinion holds that the conductor of a train is a vice principal, and not, therefore, a fellow servant of a brakeman on another train.

In *Au. vs. Ry. Co.*, 29 Fed., 72, where a brakeman on one train was killed by the neglect of a conductor on another, it was held that the brakeman and the conductor were not fellow servants.

In *Couch vs. Ry. Co.*, 22 S. C., 557, 28 Am. & Eng. R. R. cases, 331, it is determined that in order to ascertain whether an employe is the representative of a master or a fellow servant with other employes "The true test is whether the person in question is employed to do any of the duties of the master: if so he cannot be regarded as a fellow servant or co-laborer with the rest of the operatives, but is the representative of the master, and any negligence on his part in the performance of the duty of the master thus delegated to him, must be regarded as the negligence of the master."

See also *Calvo vs. Ry. Co.*, 23 S. C., 526, (28 Am. & Eng. R. R. cases, 327, and cases cited).

In *Central Trust Co. vs. Ry. Co.*, 34 Fed., 616, it was held that in a collision caused by negligence of the conductor and engineer resulting in death of a baggageman and expressman on another train, the conductor and engineer were there representing the company and were not fellow servants of the expressman.

R. R. Co. vs. Ackley, 87 Ky., 278. Engineer of passenger and those in charge of freight train held not fellow servants.

Madden vs. R. R. Co., 28 W. Va., 610, 57 Am. Rep., 695. Defendant held liable for death of engineer through negligence of conductor of another train.

Miller vs. Ry. Co., (Mo.) 19 S. W. Rep., 58. Conductor and section men not fellow servants.

Daniels vs. Ry Co., (W. Va.) 15 S. E. Rep., 162. Defendant held liable for injury to brakeman caused by negligence of conductor of another train.

In *Borgman vs. Ry. Co.*, 41 Fed., 667, it was held that a foreman at a wreck was not a fellow servant of a section man. In his opinion, Judge BREWER says: "The Ross Case recognizes the rule that one in control of a department of service is a vice principal. One for whose negligence the master is responsible, and affirms that a conductor of a train has such control of a department."

The above rule followed in *Woods vs. Lindvall*, 1 C. C. A., 37.

C.

SEPARATE DEPARTMENT THEORY.

The limitation to the general rule that the master is not liable for injury to one employe caused by the negligence of another known as the *separate department* limitation, also applies to this case. This limitation has been recognized with manifest approval by this Court in the Ross case in the following language:

"But notwithstanding the number and weight of such decisions there are in this country many adjudications of courts of great learning restricting the exemption to cases where the fellow servants are *engaged in the same department and act* under the same immediate direction."

Also in the Herbert case (116 U. S., 642), where, in discussing Section 1130 of the Dakota Code, this Court said: "The words 'same general business' in the section have reference to the general business of the department of service in which the employe is engaged, and do not embrace business of every kind which may have some relation to the affairs of the employer, or even be necessary for their successful management. If any other construction were adopted there would, under the section, be no such thing as separate departments of service in the business of railway companies; for whatever would tend to aid in the transportation of persons and property would come under the designation of its general business."

One of the greatest legal minds that ever graced this bench, the late Justice MILLER, who approved the majority opinions in the Ross and Herbert cases, held in *Garrahy vs. R. R. Co.*, 25 Fed., 258, that an engineer and section hand were not fellow servants for the reason that they were not engaged "in the same employment" and in his opinion used the following language:

"And this in my personal judgment as a matter of sound principle is also the *necessary result* of the latest decision of the Supreme Court of the United States on the same subject in the case of *C., M. & St. P. Ry. Co. vs. Ross.* The length of time that case was held under consideration by the Court and the ultimate dissent of some of its members, show the serious consideration it received and by it I am governed."

Mr. Justice BREWER, in *Howard vs. Ry. Co.*, 26 Fed.,

842, quotes without criticism from the opinion of Justice MILLER, and mentions the distinction between the Garrahy case and the Randall case (109 U. S., 478) saying (p. 843.): "In the Garrahy case, *supra*: Mr. Justice MILLER carefully notes the complete separation in the classes of service of the two employes, while in the Randall case, to be considered hereafter, the Supreme Court treats the fact that the employes were working on different trains as entirely immaterial."

In *King vs. Ry. Co.*, 14 Fed., 277, Judge GRESHAM says: "It is not the law in the Federal Courts, nor is it believed to be the law in all the state courts, that the master is relieved from responsibility in all cases in which a servant is injured by the negligence of a fellow servant. The master's immunity is limited to cases where the servants are engaged in *the same common employment*: that is to say in the *same department* of duty."

In *Ry. Co. vs. Charless*, 2 C. C. A., 380, the learned judge discussing the Ross case says: "The principles of law declared in that case would determine that the conductor and engineer of a freight train were not fellow servants of a section hand."

In *Howard vs. Ry. Co.*, 40 Fed., 195, following the Ross case, it was held that train men and track men on the same line are not fellow servants.

In Pike vs. Ry Co., 41 Fed., 95, bridge watchman and conductor were held not to be fellow servants.

In *R. R. Co. vs. Sheets*, (Ky.) 41 Am. & Eng. R. R. cases, 470, an engineer was held not to be a fellow servant of a switchman.

In *Sullivan vs. Ry. Co.*, 97 Mo., 113, (10 S. W. Rep., 852,) an engineer and fireman in charge of passenger train were held not to be fellow servants of section men.

In a well reasoned opinion in *Ry. Co. vs. O'Brien*, (Wash.) 21 Pac., 32, holding that a conductor and engineer were not fellow servants with track men, the Court used the following language: "An attempt has been made to distinguish the case at bar from *Ry. Co. vs. Ross*, by the circumstances that in the latter case the injury was caused by the conductor of the train on which the injured person was employed at the time, whereas, in the case at bar, the person whose negligence caused the injury was conductor of another train and not of the train on which the injured person was

riding. We see no difference in principle between the two cases. In each case the party guilty of negligence stood as vice principal; he represented the company; he was engaged in a totally different department of labor from that in which the defendant in error was employed, and he stood in a very different relation to their common principal."

Ry. Co. vs. Kelley, 127 Ill., 637. Section hand and those in charge of construction train not fellow servants.

Ry. Co. vs. Carroll, 6 Heisk (Tenn.), 347. Section foreman not fellow servant with those in charge of a train.

Hobson vs. Ry. Co., 11 Pac., 545. Engineer and workmen riding on engine not fellow servants.

Ry. Co. vs. Moranda, 93 Ill., 302. Company held liable for injury to track repairer caused by a lump of coal carelessly thrown by fireman from an engine.

Ry. Co. vs. Triplett, 15 S. W., 831.

Daniels vs. Ry. Co., 23 Pac., 762. Car inspector not fellow servant with train man.

Dickson vs. Ry. Co., (Mo.) 19 S. W., 412. Conductor and section men not in same department of service.

Schlereth vs. Ry. Co., (Mo.) 19 S. W., 1131. Engineer and track repairer not fellow servants.

Sullivan vs. Ry. Co., (Mo.) 10 S. W., 852. Engineer and fireman not fellow servants with section men. See also *Cook vs. Mullens*, 30 Ga., 156; 50 Am. and Eng. R. R. cases, 550.

The Court below claimed to follow the Randall case in holding that the deceased and the conductor in this case were fellow servants. They say that the decision of Justice MILLER in the Garrahy case was apparently in conflict with the Randall case by which they are governed.

Was there such conflict?

In the Randall case a brakeman on one freight train was injured by the alleged negligence of an engineer of another freight train. This Court said: "*Their separate services have an immediate common object, the moving of trains.*"

In the Garrahy case Justice MILLER said: "That a common hand engaged in the business of distributing iron rails along the side of a track, to be laid in place of other rails removed from that track, *is not in the same employment* as a man controlling and managing a switch engine *not used in carrying*

these rails, but in moving and transferring from one place to another *cars not engaged in the business of relaying said track*."

Where is the conflict?

It is evident that Justice MILLER was carefully drawing the line between those whose separate services did and those whose separate services did not "*have an immediate common object*."

From the language used by Justice MILLER the inference is plain, that had the engineer, or the cars he was moving, been engaged in hauling the material that the section man was using in repairing the track, he would have held that the two men were in the same department of service and therefore fellow servants under the rule in the Randall case—unless he should have held that the engineer was a vice principal.

It is not in our opinion necessary for this Court to even modify or enlarge the rule in the Randall case in order to hold that the deceased in the case at bar and the conductor were not engaged in services that *had an immediate common object*, and were not in the same department of service and therefore not fellow servants.

And we respectfully submit that this Court cannot sustain the doctrine of the Court below holding that under the Randall case this deceased and conductor were fellow servants in the sense that the common master was not liable to one for the negligence of the other, without establishing as a rule that all employes of a railroad corporation, who are not vice principals, whose separate services in any way contribute to the operation of a railroad and who in the discharge of their duties ever at any time or place come in sight of each other, are fellow servants.

We further submit that in the case at bar this Court cannot hold that the conductor did not stand in his relation to the deceased as a vice principal without so restricting the rule of the Ross case as to make a conductor a vice principal as to those and those only who are engaged under him in running the same train.

In other words this Court can decide that the deceased and conductor in this case were not in the same common employment, not in the same department of service and therefore not fellow servants, without overruling or even modifying the rule in the Randall case. And this Court cannot decide other-

wise without entirely abandoning the *separate department* theory recognized in the Ross and Herbert and Randall cases. Neither can this Court decide that the conductor in the case at bar was not a vice principal without restricting the rule in the Ross case as it has been interpreted by many learned jurists.

There is no theory upon which in this case it can be held that the defendant corporation was not liable for the death of deceased on the ground that the deceased and the conductor were fellow servants, unless the Court shall deem it necessary to take a backward step.

Is there reason or necessity for such backward step?

The general tendency of the decisions and of the legislatures both in this and in foreign countries is decidedly in the other direction.

In the Randall case this Court referred to the "uniform course of decisions in the House of Lords, and the English and Irish courts," as sustaining the doctrine there laid down.

Under the English Employers' Liability Act of 1880, there would be no question whatever of a recovery under the facts of the case at bar.

In *R. R. Co. as. Moranda*, 93 Ill., 302, it was well said:

"The English rule on this question" (the rule contended for by appellant in case at bar) "has in all its progress in the courts of England and America encountered constant resistance by the bar and many of the ablest jurists; and the reasons assigned in its support by the courts adopting it have been deemed inadequate and illogical, and have not been found in harmony with each other. These facts are significant in suggesting that the rule has not generally been placed on its true foundation, and has generally been carried too far."

So in the able note to the Garrahy case: (26 Fed., 264-5.)

"It may be a breaking away from the rigorous and inequitable rules of the English common law, and from the former doctrine in this country; but the tide seems to be now fully set in the direction of justice and humanity, and the poor laborer, who, under the old rules, was left to be driven about by the winds of chance, stranded upon the shoals of misfortune, or wrecked upon the rocks of adversity, will be better protected in his person and in his rights in the future."

In Scotland the non-liability of the master was from the first stubbornly resisted and only changed on appeal to the House of Lords.

In France the courts at first held that the employer was not liable to one servant for negligence of another. Subsequently the rule was changed.

The Prussian law until as late as June 7, 1881, recognized the doctrine of the non-liability of the employer, when as Professor Brun says: "These rules are not sufficient to meet the exigencies of modern life, especially in the case of such great industrial undertakings as railways."

In half if not more of the States of this Union the old rule of the Farwell case has by statute been either modified or entirely abrogated.

While we do not contend, because we do not deem it necessary, for any change in the doctrines already laid down or recognized by this Court, we see no reason why the old rule of the Farwell case should not now be modified to a greater extent than has heretofore been done by this Court. The reasons for the old rule, as far at least as railroad corporations are concerned, have ceased to exist. Let the rule cease with them.

As was well said in *Madden vs. Ry. Co.*, 28 W. Va., 610; 57 Am. Rep., 695–8.

"It may be said generally, that the only case where the old rule has not been impugned, is where the servants are so far working together as to be practically co-operating, and to have opportunity to control or influence the conduct of each other, and to have no superiority one over the other. Since the rule grew up as judicial legislation, the courts may properly qualify or limit it to avoid injustice in particular cases."

Respectfully submitted,

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SIOUX FALLS, S. D.

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Supreme Court of the United States.

OCTOBER TERM, 1893.

TERM NO. 71.

BIDDENA ELLIOTT, WIDOW OF JOHN ELLIOTT, DECEASED, PLAINTIFF IN ERROR,

vs.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

JOHN W. CARY and
ROBERT B. TRIPP,
Attorneys for Defendant in Error.

HEMAN H. FIELD,
Of Counsel.

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IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

STATEMENT OF CASE.

This action was brought in the District Court of Clay County, Territory of Dakota, to recover fifteen thousand dollars damages, for the death of John Elliott, at Meckling, in said County, alleged to have occurred from the negligence of the defendant and its employes. There was a trial at the September term, 1886, and the plaintiff recovered a verdict of seven thousand dollars. A motion for a new trial having been denied, and judgment entered upon the verdict, the defendant appealed to the Supreme Court of the Territory where the judgment was reversed at the May term, 1887. At the February term, 1888, a rehearing was granted and the appeal was again argued at the succeeding May term, and on the 9th of February, 1889, an order of reversal was entered, and the case remanded to the court below for further proceedings therein.

(*Elliott vs. Ry. Co.*, 5 Dak. 523.) The case was again tried in the District Court of Minnehaha County, at the April term, 1889, upon the same evidence, and at the close thereof the court directed a verdict in favor of defendant. A motion for a new trial having been denied, and judgment entered, plaintiff appealed to the Supreme Court of the Territory where the judgment was affirmed on May 31st, 1889, and thereafter the plaintiff removed the case by writ of error to this court.

The deceased for several years had been a section foreman on defendant's railway at Meckling, Dakota Territory, a small station where there were but a depot building, a store, a hay press, and two dwelling houses. The railway ran in a straight easterly and westerly line through said station. There was a main track, and a side track about 16 feet northerly of, and parallel thereto. (See plat Exhibit "A" Record.) There were no buildings or other obstructions to interfere with the view of approaching trains from the west, and the railroad was visible for six miles in that direction. On November 1st, 1884, about 8:30 a. m., deceased was standing a few feet south of the main track, and west of the car house, in conversation with one Smith. A regular freight train was approaching the station from the west, on the main track. Two cars in the rear part of the train were to be left on the side track. For that purpose the train was cut in three sections, and the first section, consisting of the engine and 18 cars, ran easterly along the main track, passing the deceased. The switch was then turned and the two cars ran in on the side track. The switch was then replaced and the rear section of four cars, (a flat car, a box car, a caboose and an empty passenger coach) passed along the main track. After the forward section had passed him, deceased started to cross the main track, diagonally, in an easterly direction, with his face to the east, and was struck by the rear section of the train from 10 to 30 feet east of the car house. The cars were moving at a speed about equal to a brisk walk, two brakes having been applied by the Conductor who was on one of the rear cars of that section. The day was clear. The accident occurred at a point on defendant's depot grounds not within the limits of any highway crossing or traveled place.

ARGUMENT.

The request made by defendant in the trial court for the direction of a verdict in its favor, was based upon three grounds, either of which, it is submitted, is sufficient to sustain the ruling of that court, which was affirmed by the Supreme Court of the Territory.

I. There is no evidence of actionable negligence on the part of the defendant, as to the deceased employe.

II. The accident was the result of an ordinary risk of the employment, or of the negligence of employes engaged in the same general business, for which no recovery can be had under Section 1130 of the Civil Code of Dakota Territory.

III. The evidence shows such contributory negligence on the part of the deceased as will prevent any recovery.

These grounds will be considered in the order stated, with the evidence applicable thereto.

I.

There is no evidence of actionable negligence on the part of the defendant, as to the deceased employe.

The complaint alleges, in effect, that the defendant conducted itself so negligently, carelessly and unskillfully in the management of its train, that through the gross negligence, carelessness and unskillfulness of the defendant, and its conductor of said train, in making a double flying switch, and in not giving timely warning thereof, nor using proper safeguards to prevent injury to those rightfully on or near defendant's track, the last section of said flying switch, being a part of said train, ran violently against and thereby killed said Elliott. There was no evidence that the rear section of the train which struck the deceased was going at a rapid or dangerous rate of speed; or that it was managed in a negligent manner, unless that is to be inferred from the fact that the train had been severed into three parts for the purpose of diverting two cars onto the side track, which work had been completed and the rear section was passing along the main track at the time of the accident. A rule of the defendant

was introduced in evidence as follows: "42. *Flying switches are prohibited except at spur sidings;*" and the contention of the plaintiff was that there was a negligent violation of this rule which caused the accident. It is not unreasonable to assume that one object of the rule was to prevent making flying switches at such places as might expose the public to danger. The making of a flying switch is also attended with danger to rolling stock. A slight mistake or error of judgment on the part of those making it, might cause a derailment of the cars, or a collision of the different sections of the train, and it may be presumed that another object of the rule was to prevent such accidents.

There was no evidence that the operation of the train in the manner shown by the evidence was negligent, at least as to employes, in daylight, at an insignificant station like Meckling, a place containing only five or six buildings, and not of sufficient importance to warrant the employment of a station agent. The risk of such a method of operating the train, was not materially different in kind or degree from the risk of the operation of trains in the usual manner, as to an experienced employe, like the deceased, who was acquainted with the locality, and familiar with the use of the main track for the purpose of passing trains. There was no more danger in making a flying switch at the place of the accident than at a spur track where the rule did not apply. It was contended by the plaintiff in the courts of the Territory, that the alleged violation of the rule was such negligence on the part of the defendant as would entitle the plaintiff to recover. This question was not passed upon by the Supreme Court of the Territory, whose decision proceeded upon other grounds. The defendant in error, however, contends that there was not sufficient evidence tending to show negligence on its part to sustain a verdict for the plaintiff.

Undoubtedly the making of a flying switch in a populous city or village, or over street crossings, or grounds much traveled or used by the public, is evidence of negligence on the part of a railroad company, as to travelers, or passengers, or persons rightfully using the premises who are injured thereby.

The decisions of the courts condemning the practice of making such flying switches proceed upon principles inapplicable here, and in nearly every case where a recovery has been allowed, these elements existed: *1st.* The accident occurred at a public street or highway crossing, used and traveled as such, or on depot grounds. *2nd.* The person injured was either a traveler upon such street or highway, or a passenger upon such depot grounds. *3rd.* There were two or more tracks at the place of the accident. *4th.* The negligence consisted in this: That after a train, or portion of a train, had been run across a street or highway, or on depot grounds, on a particular track, thereafter, without warning, a detached car, or section of a train, was thrown upon another track and passed over such crossing, thereby placing the traveler or passenger, who had been lulled into a sense of security and thrown off his guard by the passage of the first section, in a position of unexpected danger. In addition, there have been generally complicating circumstances, such as darkness, dense smoke or escaping steam, obstructed view, excessive or unlawful speed, absence of a flagman, or failure to have a person in charge of detached cars. Reference to the language of the text writers and judges will disclose the reasons for the rule declaring the making of flying switches in such cases to be negligence.

1 Thompson on Negligence, p. 423, Sec. 6.
Beach on Contributory Negligence, 2nd Ed., Sec. 217.
Patterson on Railway Accidents, Sec. 171.
Butler vs. R'y Co., 28 Wis., 487.
Brown vs. R. R. Co., 32 N. Y., 597, 598.
R. R. Co. vs. Converse, 139 U. S., 469.

These authorities do not sustain the claim of negligence under the circumstances of this case. The accident occurred upon the station grounds of the defendant, in broad daylight, at a place where there was nothing to obstruct the view of approaching trains. The sections of the train were moving at a moderate rate of speed. There was no proof that this method of operating the train was one that tended to increase the hazards to which employes upon station grounds were subjected. It was no more dangerous to cut the train in two, and run the

sections along the main track, independently, under the circumstances, than it was to run them as one train, and the danger from the rear section of the train was no greater than it would have been from the train itself, running as a whole, or had the engine been cut off and run ahead, and the balance of the train followed afterwards upon the same track.

Again, the movement of the train, so far as it related to the place where the accident occurred, was not a *flying switch*, as defined by the authorities. The peculiar danger and hazard of a flying switch which the courts condemn, is that caused by the sudden and unexpected movement of cars upon *another* track from the one on which others had previously passed, without sufficient warning of danger. Here, the section which caused the accident was running upon the main track, the same upon which the first section had passed, and there is no evidence tending to show that the deceased was ignorant of the fact that this section was approaching. He had seen the first section pass, he also saw the two cars proceeding upon the side-track, and must have known that the remainder of the train, containing the caboose which was attached to all trains, was yet to pass on the main track. There was, as to him, and as to the main track, no *flying switch* made, and therefore the case does not come within the principle contended for on behalf of the plaintiff.

Jeffrey vs. R. R. Co., 51 Ia., 439, 441.
R'y Co. vs. Bracken, 59 Texas, 71; 14 Am. & Eng. R. R. Cases, 691.

Nor was it negligence on the part of the defendant that there was no person on the forward end of the rear section to give notice of its approach, or no warning to the deceased. It is not negligence for a railroad company to move trains at a slow rate of speed, on its station grounds, without giving warning to employes engaged thereon, where there is nothing to prevent such employes from seeing or knowing of the approach of such trains.

Aerkfetz vs. Humphreys, Receiver, 145 U. S., 418.
R'y. Co. vs. Donahue, 75 Ill., 106.

Kelley vs. R'y. Co., 53 Wis., 74, 78.
Ring vs. R'y. Co., 20 S. W. Rep., (Mo.) 436.

II.

The defendant is not liable, under Section 1130 of the Civil Code of the Territory.

That Section is as follows: "An employer is not bound to indemnify his employe for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employe." (Comp. Laws, 1887, Sec. 3753.)

(1.) The accident resulted from the ordinary risks of the business in which the deceased was employed.

The deceased was 48 years of age, and had been in the employment of the defendant as a sectionman about 10 years, and for 5 years had been section foreman at the place where the accident occurred. It must be presumed that he was familiar with the running of trains on that line, and with the usual and ordinary operations of the railroad. His employment required him to be on or about the tracks at all times, and necessarily made him familiar with the movement of trains thereon. The danger resulting from the passage of trains upon the railroad was an ordinary risk of his employment, incident to the business of the defendant in which he was engaged, and his familiarity therewith must be presumed. Whether the accident was caused by the making of a flying switch, as claimed, or by the ordinary movement of the train, it occurred in the prosecution of the business of the defendant, carried on upon its railroad, within the immediate view of the deceased. The fact that the making of such switches at that station was unusual, is not controlling; the defendant was in the habit of daily running engines and trains in both directions, of switching cars and of doing all the necessary work connected with the operation of its railroad. The *principal* risk which he incurred was the risk of injury *from the use of the railroad, in the running of trains*, and the accident resulted from the operation of a portion of a train upon the main track, which was contin-

ually used for that purpose. The peril was one connected with the business, of which no one had better knowledge than himself. The case therefore, comes not only within the express language of the statute referred to, but within the general rule that an employe assumes the ordinary risks and hazards of the business in which he is employed, and for an injury resulting therefrom he cannot recover of his employer.

Randall vs. R. R. Co., 109 U. S., 478, 483.

B. & O. R. R. vs. Baugh, 149 U. S., 368.

One of the rules of defendant (Exhibit "B," Rule 63,) provides that no notice will be given to trackmen of the passage of irregular trains, and that they must govern themselves accordingly.

Under a similar rule it has frequently been held that the danger from the passage of irregular trains was a hazard and risk incident to the employment, for which no liability exists on the part of the railroad company.

McGrath vs. R. R. Co., 14 R. I., 357; 15 R. I., 95.

R. R. Co. vs. Wachter, 60 Md., 395.

R'y. Co. vs. Leech, 41 Ohio St., 388.

Olson vs. R'y. Co., 38 Minn., 117.

Larson vs. R'y. Co., 43 Minn., 423.

Jolly vs. R'y. Co., 93 Mich., 370.

(3) The negligence, if any, was that of persons employed by the same employer, in the same general business, within the meaning of said Section 1130.

It is not claimed, nor is there any evidence, that the defendant had neglected to use ordinary care in the selection or retention of the persons operating the train at the time of the accident, and the question presented is, Whether, if there was negligence on their part which caused the accident, it was that of persons employed "in the same general business."

The case does not, we believe, require an effort to reconcile the conflicting decisions of the State Courts upon the subject of who are fellow servants in the railroad service; *first*,

because it is governed by the Statute above referred to, and, *second*, because the principles controlling the determination of this question have been settled by authoritative decisions of this court.

(1) The case is within the express terms of the Statute which must govern in the determination of this question.

Section 6 of the Civil Code of Dakota (Compiled Laws, 1887, Section 2505) provides:

"In this territory there is no Common Law in any case where the law is declared by the Codes."

Section 2129 of the same Code (Compiled Laws 1887, Sec. 4763) provides:

"The rule of the common law that Statutes in derogation thereof, are to be strictly construed, has no application to this code. This code establishes the law of this Territory respecting the subjects to which it relates; and its provisions are to be liberally construed with a view to effect its objects and to promote justice."

Section 1130 had its origin in the uncompleted labors of a commission appointed in the State of New York to prepare a code of laws. It was enacted in California in 1873; it was adopted and re-enacted in Dakota in 1877. It has frequently been construed by the Supreme Court of California, where it has been held that the statute extends somewhat the rule of the Common Law exempting the employer from liability to his employe for injuries at the hands of fellow-servants, and that it clears away many of the difficulties and distinctions existing under the Common Law as to the meaning of the term "fellow-servants."

Thus in *Fagundes vs. Railway Company*, 79 Cal., 97, it was held that a laborer, employed by the defendant to work upon its track under the control of a road-master, and the conductor in charge of a train running upon that track, were fellow-servants employed in the same general business, within the meaning of the statute, so that there could be no recovery for the death of the former caused by the negligence of the latter. Other decisions of that court extend the exemption of the master, under the statute, to cover cases of employes in different departments of the service, and hold in harmony with the

rule of this court, that the negligent act will be held that of a fellow-servant, unless it be a violation of a personal duty, owing by the master to his servant, the performance of which has been delegated to the negligent employe.

Brown vs. R. R. Co., 7 Pacific Reporter, 447.

Hogan vs. R. R. Co., 49 Cal., 128.

Congrave vs. R. R. Co., 26 Pacific Reporter, 175.

Davis vs. R. R. Co. 32 Pac. Rep., 708.

The rule of these decisions is, we submit, the one to be applied in construing the statute and determining whether a particular case falls within it, and tested by this rule, the case at bar falls clearly within the statute, for the reason that the section foreman was *in the same general business* with the conductor and other employes engaged in the operation of the train.

It is true that in the case of *Railroad Company vs. Herbert*, 116 U. S., 642, which arose in the same Territory, there is language in the opinion of the majority to the effect that Section 1130 did not change the law previously existing as to the exemption of the master from liability for injuries to a servant, caused by the negligence of a fellow-servant; and that the words "same general business," have reference to the general business of the department of service in which the employe is engaged. That language, however, was used in reference to a state of facts which tended to show a liability at the common law, irrespective of the statute, and the case was also within the express terms of Section 1131 of the Civil Code, which provides that "an employer must in all cases indemnify his employe for losses caused by the former's want of ordinary care." That was a case of a brakeman employed in the operation of cars, who was injured by the negligence of other employes, whose duty required them to keep such cars in repair. It was a case of the non-performance of a duty owing by the master to his servant, and therefore one in which there was a liability at the Common Law and under Section 1131. It was there contended, on behalf of the Railroad Company, that under the provisions of Section 1130, persons employed in the

keeping of cars in repair, were engaged in the same general business as persons using such cars, and that the Company was relieved from liability. This view was rejected by a bare majority of the Court, four of its members being of the opinion, that Section 1130 made the employes whose duty it was to repair cars, fellow-servants with the persons using them. The decision was in line with the general rule of law respecting the liability of the master for non-performance of a duty owing to the servant, and there is nothing in it which sustains the contention of the plaintiff in error herein.

In the case of *Ell vs. Railroad Company*, 48 Northwestern Reporter, 222, Sec. 1130 was before the Supreme Court of North Dakota, and in an exhaustive opinion, citing numerous authorities, it was held that the test of the relation of fellow servants, was whether the act of negligence committed was a violation of a duty owing by the master to the servant, and that where such was not the case, the exemption of the master would apply, although the employes were not in the same rank or department of service.

We submit therefore that this case is governed by the statute, and that under a proper construction of it all employes of a railroad company whose duties unite in the operation of a railroad, either in the running of trains, or in the keeping of the road-bed and tracks in repair are persons *employed in the same general business*, and therefore within the exemption of liability of the employer contained in said section; and that, whether the rule of the common law makes any distinction between different grades or departments of service, so far as involved here, that rule is restricted and controlled by the statute in question.

(2.) But, aside from the statute, and considering the question upon the weight of authority in this Court, and in the Courts of the States, it is submitted that the conductor and the deceased were fellow-servants, in the same general employment, and therefore the rule of the exemption of the master from liability, must be applied. As stated in the *Baugh* case (p. 384) "*Prima facie*, all who enter into the employ of a

single master are engaged in a common service and are fellow-servants," and while, as suggested in the opinion in that case, there may be departments in the railroad service so widely different in character that the employes of one may not be fellow-servants of those in another, yet, as applied to the principal business of a railroad company—the operation of its railroad—all employes whose duty is connected with that service, either in the operation of trains or in the care and maintenance of the railroad track in a condition for their safe operation, are fellow-servants. The foundation of the rule of the exemption of the master, is that he does not impliedly undertake with his servants that they will not receive injury from the acts of other servants associating with them in the performance of their common undertaking, and that, in the absence of some fault on his part in the employment of the servants or in the maintenance of the instrumentalities of the service, an employe assumes the risk of injury from the negligent act of another employe, engaged in the common service. (*Hough vs. Ry Co.*, 100 U. S., 213, 217). A controlling question is, Does the employment of the injured servant place him in a position where he is liable to meet with injury from the negligent performance by another employe of his work, so that the risk of such injury may be said to be fairly within the contemplation of the servant at the time he enters such employment? This rule is the one approved by the weight of authority both of the text writers and the courts, and is expressly approved by this Court.

In 2 *Thompson on Negligence*, 1034, Sec. 37, and 1037, Sec. 38, the learned writer approves the rule stated in *Morgan vs. Railroad Company*, 5 Best & S., 570, 580; 33 L. J. (Q. B.), 260 (subsequently approved in the Exchequer Chamber, L. R., (Q. B., 154); 5 Best & S., 736), viz:

"Whenever the employment is such *as necessarily to bring the person accepting it into contact with the traffic of the line of Railway, risk of injury from the carelessness of those managing that traffic, is one of the risks necessarily and naturally incident to such employment and within the rule.*"

And in respect to the railway service it is stated that "all

who are engaged in accomplishing the ultimate end in view—that is, the running of the road—must be regarded as engaged in the same general business and within the rule."

The same test was applied in *Randall vs. R. R. Co.*, 109 U. S., 478, 484, where a switchman employed in a railroad yard, was injured by the negligence of an engineer of a train running in such yard but with which the switchman had no connection or employment. Mr. Justice Gray, in holding that these employes were fellow-servants, said:

"They are employed and paid by the same master; the duties of the two bring them to work at the same place at the same time, so that the negligence of the one in doing his work, may injure the other in doing his work. Their separate services have an immediate common object, the moving of the trains. Neither works under the orders or control of the other; each by entering into his contract of service, takes the risk of the negligence of the other in performing his service; and neither can maintain an action for an injury caused by such negligence, against the corporation, their common master."

The rule of that case has been applied in other cases in this court, and has recently received its approval in *Railroad Company vs. Baugh*, *supra*.

Armour vs. Hahn, 111 U. S., 313.

Steamship Co. vs. Merchant, 133 U. S., 375.

The current of authority in the Circuit Courts of Appeal, and in the Circuit Courts, especially the more recent cases, is to the same effect. It is not denied but that there are decisions in those Courts tending to support the contention of the plaintiff in error, but, it may be said that many of them, following the supposed rule of the *Ross case*, prior to its review in the *Baugh case*, *supra*, proceeded upon the doctrine of superior authority or control of one employe over the other (now inadmissible under the rule of the *Baugh case*) or were decided upon the ground of negligence of the master, or of a person charged by him with the performance of a duty owing to the injured servant. The following cases in the Federal Courts sustain the contention of the defendant in error:

R. R. Co. vs. Hyde (Cir. Ct. of App.,) 56 Fed. Rep. 188; where an engineer and yard car-clerk were held fellow servants.

R. R. Co. vs. Andrews, 6 U. S. App.; 50 Fed. 728; engineer and conductor of one train and brakeman of another.

R. R. Co. vs. Mealer, 6 U. S. App.; 50 Fed., 725; switchman and section men.

R. R. Co. vs. Young, 1 U. S. App. 96; 49 Fed , 723; engineer and fireman.

R. R. Co. vs. Howe, U. S. App.; 52 Fed., 362; engineer and brakeman.

Van Wickle vs. R'y Co., 32 Fed., 278; engineer and section man.

Easton vs. R'y Co., 32 Fed., 893; engineer and section man.

Van Avery vs. R. R. Co., 35 Fed., 40. engineers of different trains.

Howard vs. R. R. Co., 26 Fed., 837; engineer and fireman of different trains.

Naylor vs. R. R. Co., 33 Fed., 801; engineer and switchman.

R'y Co. vs. R'y Co., 31 Fed., 527; engineer and brakeman.

Kerlin vs. R. R. Co., 50 Fed.; 185; conductor and baggagemaster of another train.

Garraby vs. R'y Co., 25 Fed., Rep. 258, decided by Mr. Justice Miller, while apparently sustaining the position of the plaintiff in error, seems to be in conflict with the rule in *Randall vs. R. R. Co.*, 109 U. S., 478.

The weight of authority in the State Courts is to the effect that employes engaged in the operation of trains, are fellow-servants of those employed in the maintenance of the track, as will be seen by reference to the following decisions: (The negligent employe precedes the injured employe)

New York.

Boldt vs. R. R. Co., 18 N. Y. 432; engineer and section man.

Coon vs. R. R. Co., 5 N. Y. 492; trainmen and section man.

Henry vs. R. R. Co., 81 N. Y. 373; brakeman and shoveler.

Potter vs. R. R. Co., 136 N. Y. 77; brakeman and car repairer.

Besel vs. R. R. Co., 70 N. Y. 171; brakeman and car repairer.

Mele vs. R. R. Co., 14 N. Y. Supp. 630; engineer and trackman.

Massachusetts.

Farwell vs. R. R. Co., 4 Met. 49; engineer and switchman.

Holden vs. R. R. Co., 129 Mass. 268; trackman and brakeman.

Clifford vs. R. R. Co., 141 Mass. 564; engineer and section man.

Pennsylvania.

Keyes vs. R. R. Co., 3 Atlantic Reporter 15; engineer and section man.

R. R. vs. Bell, 112 Pa. St. 400; gas fitter and switchman.

Campbell vs. R. R. Co., 2 Atl. Rep. 489; brakeman and car repairer.

Maine.

Blake vs. R. R. Co. 70 Me. 60; trainmen and section man.

Rhode Island.

Gaffney vs. R. R. Co., 15 R. I. 456; station agent and brakeman.

Maryland.

R. R. Co. vs. Wachter, 60 Md. 395; engineer and section man.

Ohio.

Whalan vs. R. R. Co., 8 Ohio St., 249; engineer and section man.

Indiana.

Gormley vs. Ry Co., 72 Ind., 31; engineer and seeman.

Capper vs. R. R. Co., 103 Ind., 305; engineer and section man.

Minnesota.

Foster vs. R. R. Co., 14 Minn., 360; trainman and section man.

Collins vs. R. R. Co., 30 Minn., 31; engineer and section man.

Brown vs. R. R. Co., 31 Minn., 553; station agent and engineer.

Connelly vs. R. R. Co., 38 Minn., 80; engineer and section man.

Wisconsin.

Cooper vs. R. R. Co., 23 Wis., 668; section man and brakeman.

Haviland vs. R. R. Co., 54 Wis., 226; conductor and shoveler.

Heine vs. R. R. Co., 58 Wis., 525; conductor and shoveler.

Toner vs. R. R. Co. 69 Wis., 188; station agent and brakeman.

Michigan.

Harrison vs. R. R. Co., 79 Mich., 409; engineer and section man.

Peterson vs. R. R. Co., 67 Mich., 102; engineer and car repairer.

R. R. Co. vs. Austin, 40 Mich., 247; trackman and switchman.

Adams vs. Cliff Co., 78 Mich., 271; engineer and founder.

Mining Co. vs. Kitts, 42 Mich., 34; timber man and miner.

Texas.

R. R. Co., vs. Rider, 62 Tex., 267; engineer and section man.

R. R. Co., vs. Welch, 72 Tex., 298; trainman and section man.

West Virginia.

Beuhring vs. R. R. Co., 16 S. E. Rep'tr, 435; engineer and car numberer.

Unfried vs. R. R. Co., 34 W. Va., 260; engineer and carpenter.

Missouri.

Rohback vs. R. R. Co., 43 Mo., 187; engineer and conductor and trackman.

Parker vs. R. R. Co., 50 Am. & Eng. R. R. Cases, 521; trainmen and section man.

Florida.

R. R. Co., vs. Weese, 13 Southern Reporter, 436; engineer and wiper.

If, as has been shown, some other test than that of subordination, must be applied in determining when employes of one master are in the same general business, what more reasonable or practicable rule can be found than that such employes, although in different branches of the common service, are fellow servants when employed in business that may bring them into association with each other, at the same time and place, where one may encounter the risk of negligent acts of others employed in the general business carried on for the common master. If the underlying principle of the exemption of the master, is that of a *risk* assumed by the servant in the prosecution of the business, then the rule must be applied wherever the *risk* arises. That risk arises as well when the servants are in different grades of rank, as where they are equal; as well where they are engaged in different branches of the work at the same time and place, as where they are engaged in the same branch. Wherever one in doing his work may encounter the risk of accident at the hands of another in doing his work, whether they be equal in rank or otherwise, or whether the work be the same in kind, or otherwise, the rule of exemption of the master applies.

Judge Dillon in *24 Am. Law Review*, 190, states the rule thus:

"The real inquiry is, Was the injury caused by another servant, one of the ordinary risks of the particular employment? If so, the mere grade, whether higher, lower, or co-ordinate, or the department of the faulty servant, is of no consequence. The true inquiry in each case is, Was the accident one of the normal and natural risks in the ordinary course of business? If so, then there is no common law liability on the part of the employer, and the inquiry, except as it

bears on the above, is not one of grades or departments. This is the final form the doctrine has assumed, and it is the correct one. It is plain, intelligible and practicable. It is founded upon just principles, viz: that it is precisely commensurate with the master's personal duties."

See *R. R. Co., ex. Triplett*, 48 Am. & Eng. R. R. Cases, 283, 288, and *Ell ex. R. R. Co., Ib.* 318, 323, where this rule is cited and approved.

As applied to the railroad service, the application of these principles may work different results as the character of the employment and the facts in each case differ. While no general rule may be laid down applicable to all cases, yet under the circumstances existing here, there being no evidence of personal fault, or of the violation of a positive duty of the master, we think the conclusion follows, that a section hand, engaged in keeping the railroad in proper condition for the safe passage of trains, and whose duty requires him to be on or about the track upon which those trains are run, and exposes him to the risk and danger of accident in the running of them, whether resulting from their proper operation, or from the negligence of competent persons in charge thereof, is a person "*in the same general business*" with a conductor engaged in the operation of those trains and cannot recover for injuries caused by his negligence. What other hazard is assumed by a section man whose duty thus requires him to be upon and about the railroad track? Is it limited to the risk of accident resulting from the negligence of his fellow section men in the prosecution of their work, or to the running of the hand-car used therein? All of his duties are connected with the operation of the railroad, and in the immediate vicinity thereof. Most of the risks to which he is exposed arise from the *operation* of trains. The conductor in doing his work may injure the section man or in turn be injured by the act of the latter. The two are brought into association together, not by reason of any superiority of rank of one above the other, but by reason of the character of the separate duties each has to perform in carrying forward the common object of their employment—the operation of the railroad.

It is sought, on behalf of the plaintiff in error, to bring the case within the decision in *Railway Company vs. Ross*, 112 U. S., 377, and to sustain a recovery thereunder, either upon the ground, supposed to be sanctioned by that decision, that the conductor in charge of the train was superior in rank to the deceased section foreman, and therefore not a fellow-servant with him; or that, being in control of the train, he represented the defendant and was therefore a vice-principal; or, finally, that the two employes were engaged in different departments of the service, and were not therefore fellow-servants within the statute, or the rule established by the decisions.

(1.) The contention that the conductor was not a fellow-servant because he was a superior in rank, or in control of the section foreman, cannot be sustained:

First: Because it has no foundation in fact, the evidence showing (p. 17) that the conductor had no authority over the deceased, and nothing to do with the hiring or discharging of section men. The claim, that, under Rule 69, (p. 7) which provides that "track foremen must at all times hold themselves in readiness to aid the passage of trains, and in case of accident or delay will obey orders of the conductors," the section foreman was placed in subordination to the conductor, is unsound. There is no evidence that any orders had been given by the conductor to the deceased, and there was no accident or delay which required them.

Second: This contention is also disposed of by the decision in *Railroad Company vs. Baugh*, 149 U. S., 368, where the *Ross* case was distinguished and explained. It was there held that an engineer of an engine, running without a train, who, under the rule of the Company was to be regarded as the conductor, was still a fellow-servant with the fireman of such engine, who was under the control of the engineer. Construed in the light of the decision in the *Baugh* case, it is apparent that the rule declared in the *Ross* case, in view of the facts upon which it arose, must be restricted to a case where the conductor has been delegated by the Company with full authority and control over the train, as to *the persons employed upon it*, and that, except for

such delegation of authority, he would, even, as to employes upon the train subject to his control, be regarded a fellow-servant.

(2). Nor can it be maintained that the conductor because in control of the train, and those upon it, was, *as to the deceased*, a representative of the defendant, or a "vice-principal." Whatever may have been his relation to his immediate subordinates engaged with him in running the train, or whatever authority the defendant may have delegated to him as to the train, and his fellow trainmen, as to a section man he did not stand in the relation of representative, but simply a fellow servant. A servant may, at the same time, be a representative of the master, as to some employes, or with reference to some duties, while as to other employes and in regard to other duties, he will be a fellow servant.

"An employe may, in certain instances occupy a dual position, that of co-servant as to all matters within the scope of the employment and *the discharge of such duties as are not personal to, or absolute upon, the master*, and as agent of the master as to all matters where he is charged *with the discharge of duties which the master himself should have discharged, or which rest upon the master as absolute duties.*"

McKinney on Fellow Servants, Sec. 42, cases cited *n.* 1.
Crispin vs. Babbitt, 81 N. Y. 516.
Justice vs. R. R. Co., 130 Ind. 321.

The question whether the negligent employe is a representative of the master, or a vice-principal, turns upon the *character of the act to be performed*. If the duty is one which the master owes performance of to his servants, then a violation of that duty by another employe charged with its execution, is the negligence of the master, for which the injured servant can recover. On the other hand, if the negligent act is not a failure to perform a duty owing by the master, but a violation of a rule or regulation of the master for the government of the employe in carrying on the work, then it is merely the negligence of a fellow servant, notwithstanding that the negligent employe and the injured employe may be in different lines of service, and notwithstanding one may be superior in control to the other.

R. R. Co. vs. Baugh, 149 U. S., 368, 387.
Quinn vs. Co., 23 Fed., Rep. 363, 365.
Justice vs. Co., 130 Ind., 321.
Ell vs. R. R. Co. (N. D.,) 48 N. W. Rep. 222; and cases cited in opinion of Corliss, C. J.

Tested by this rule the conductor was not as to the deceased a representative, or vice principal. He was simply charged with the duty of operating a train upon the railroad in obedience to the regulations of the defendant. He was entrusted with the performance of no absolute duty of the master toward the deceased, but only with compliance with the rules governing his own conduct. He was no more the representative of the defendant toward the deceased than the brakeman or engine men of the train.

Assume that the conductor was negligent in violating a rule of the defendant in regard to the making of flying switches, this was not a breach of any duty owing by the defendant to the deceased. The defendant owed him a duty to employ competent servants for the operation of its trains, to provide him with a reasonably safe place in which to perform his work, and to make suitable rules and regulations governing its business. These regulations were to be carried out and executed by subordinate employes, and if the conductor negligently executed the rules or disobeyed them, the act was not that of the defendant, but of the conductor, and he alone would be responsible therefor. If the master has employed competent servants, and provided proper rules for their conduct, his duty in that respect has been performed, and he cannot be held liable if one employe has violated the rules to the injury of another. The risk of such violation is one incident to the contract of service.

R. R. Co. vs. Baugh, *supra*, 385, 386.
Howard vs. R. R. Co., 26 Fed. Rep. 837, 842.
Slater vs. Jewett, 85 N. Y., 61, 67, 72–75.

(3) Equally unsound is the claim that the decision in the *Ross* case justifies the position that the conductor and the section foreman were in different departments of service, and therefore not fellow servants. We think it has heretofore

been shown that the weight of authority, both in the federal and the State courts, is to the effect that persons sustaining such relation as existed here, are fellow servants. Is there anything in the decision of the *Ross* case tending to support the opposite conclusion? The court expressly declined to pass upon the question (*pp.* 389, 390). It has not therefore committed itself, and the rule of *Randall vs. R. R. Co.*, *supra*, which the court below followed, stands as the rule of this court. The Federal courts were not agreed as to the effect to be given the decision in the *Ross* case, prior to the decision in the *Baugh* case, but now it would seem that there can be no room for misconception as to the doctrine of this court It was manifestly not intended in the *Ross* case, as expressly stated, to lay down any general rule beyond the requirements of that case.

It may be noticed that while the opinion in the *Ross* case cites with approval (p. 392, 393) *R. R. Co. vs. Stevens*, 20 Ohio, 415, decided in 1851, and *Ry. Co. vs. Keary*, 3 Ohio, St., 201, decided in 1854, holding that a railroad company was liable for injuries to an engineer and brakeman, respectively, caused by the negligence of a conductor, upon the ground of his superior relation and control, yet the same court in 1858, in *Whalan vs. R. R. Co.*, 8 Ohio, St., 249, without overruling those cases, held that the Company was not liable for injuries to a section man caused by the negligence of a conductor, saying:

"This case it will be perceived, is not one in which the party injured is placed by their common employer in a position subordinate to, and subject to the orders of the fellow servant through whose negligence and misconduct the injury occurs, so as to come within the principle decided in *R. R. Co. vs. Stevens*, and *R. R. Co. vs. Keary*, but the question is whether the master or employer is liable to one servant for injuries received by the negligence of a fellow servant, *where no relation of subordination or subjection exists between them while engaged in the business of their common employer.*"

And in *Foster vs. Ry. Co.*, 14 Minn., 360, the same ruling was made in the State where the cause of action in the *Ross* case arose, and the theory of separate departments ad-

vanced on behalf of the plaintiff, was repudiated. The court say:

"The general rule must be held to apply, and the master exonerated from responsibility, notwithstanding the servants are engaged in distinct departments of the same general service or business. They were engaged in promoting the same general object, to-wit, the operating of the defendant's railroad; the plaintiff, by aiding in the repairs of the track so that trains could be run thereon, the other servants by running trains."

Both cases were cited by this court in its opinion in the *Randall* case. The efforts made by many courts to create exceptions to the general rule, upon a supposed distinction as to different departments of the service, serve to illustrate the wisdom of the remarks of Chief Justice Shaw in the leading American case on the subject, (*Farwell vs. R. R. Co.*, 4 Met., 49,) in reply to the argument that the rule should only apply where the servants are in the same department, where each can exert some influence on the conduct of the other:

"But we think this is founded upon a supposed distinction on which it would be extremely difficult to establish a practical rule. When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department, and what a distinct department of duty."

See also *Crodeur vs. Co.*, 16 R. I., 448.

III.

The evidence shows such contributory negligence on the part of the deceased as will prevent any recovery.

We invite the attention of the court to the testimony confident that it will lead to the conclusion that the real cause of the accident was the contributory negligence of the deceased. The evidence shows that just before the train arrived at the station, the deceased and one Smith were standing on the south side of the main track, a short distance west of the car-house, and about opposite the point marked "A" on the plat. (Rec. pp. 9, 12, 15.) While standing there, the forward section of the train passed them on the main track.

After it had passed the two men separated, Smith going west toward the depot, and deceased walking in an easterly direction. While walking toward the depot, Smith met the rear section of the train, and he turned and looked, and saw that deceased had gone from ten to fifteen feet east of the car-house, and had stepped onto the main track to cross to the other side. At that time the rear part of the section was opposite Smith. It was while crossing the track at that time that the deceased was struck by the cars. The testimony is undisputed that the track was straight and the view of approaching cars from the west was unobstructed at the place where deceased had been standing, and in the vicinity of the car-house. It was a clear, bright morning. The engine with eighteen cars had passed to the east, and there is no pretence that there was any smoke or steam from the engine which interefered in any way with his view. The brakeman, Welch, who was on top of the cars that went in on the side-track, testified as follows:

"The first I saw of Elliott *he was on the main track;* he was running slowly, angling on the track, crossing the track at an angle. *The front end of the rear section of the train at that time, I should judge, was about half a car length from him.* As soon as I saw him, I hollered to him to get off. I told him to get off the track or he would get run over. I did not have time to say it a second time when the car struck him. *He was running the same way the train was going. Q. Was he looking toward the train or see it coming at all? A. No, sir; I did not notice.* I called him once, and did not have time to call the second time before he was struck." (Rec. p. 16.)

This testimony confirms that of plaintiff's witness, Smith, who testified:

"As I went west towards the depot, the rear end came down the track and immediately passed me. The last I saw of Elliott before the accident happened was when I turned to look, and *he was just in the act of stepping over the south rail. At that time he was across the south rail. I saw him. He was stepping across.* At that time I was about ten or fifteen feet from where I was talking with him. *The last I saw of Elliott he was stepping across the rail. At that time the train must have been most down to Elliott. I should judge the car*

was about 25 or 30 feet from Elliott when he crossed the rail. The last I saw of him before the accident was at that time." (Rec. 11.)

The testimony of these two witnesses clearly shows the manner in which the accident occurred. It proves beyond doubt that deceased started to cross the main track, with the rear section of the train in full view and not more than twenty-five or thirty feet away from him. It further shows that he was *crossing the track diagonally*, with his back toward the rear section, that he did not turn or look in the direction from which the cars were coming; and that he stopped and was standing upon the track at the time he was struck by the cars.

It seems so clear that the evidence in this case shows a want of ordinary care on his part that we shall not argue the question at length herein, but cite a few pointed authorities where the facts were similar to those in this case, in support of this position.

Aerkfetz vs. Humphreys, 145 U. S., 418.
Holland vs. R'y. Co., 18 Fed. Rep., 243.
Behrens vs. R'y. Co., 5 Col., 400.
Haley vs. R. R. Co., 7 Hun., 84.
Keyes vs. R. R. Co., 3 Atl., Rep., 15 (Pa.)
Haden vs. R. R. Co., (Iowa,) 48 N. W. Rep., 733.
R. R. Co. vs. De Pew, 40 Ohio Stat., 121.
R'y. Co. vs. Donahue, 75 Ill., 106, 108.
Galveston, etc., R'y. Co. vs. Bracken, 59 Tex., 71.
Clark vs. R. R. Co., 128 Mass., 1.
Bresnahan vs. R. R. Co., 49 Mich., 410.
Boystad vs. R'y. Co., 31 Minn., 208.

It is contended by plaintiff in error that the jury might exonerate the deceased from the charge of negligence, for two reasons:

First: Because the deceased at the time of the accident was engaged in performing some duty of his employment, and while so engaged was not negligent in failing to observe the approach of the rear section of the train.

Second: Because a flying switch was being made which was prohibited by the rules of the company, upon the obedience of which the deceased had a right to rely.

(1.) The first ground is untenable for the reason that the deceased was not *necessarily* upon the main track at the time of the accident. It does not clearly appear what he was doing just before he was killed, but assuming that the evidence tends to show that he was watching the two men and the hand-car on the side-track, or giving directions to them, *yet that duty did not require him to stand or be upon the main track at that time.* In the performance of that duty he could have stood at some place other than upon the main track, and if he had done so he would have been in a place of absolute safety. He was not prosecuting any work on the main track, or appertaining to that track, but the position he assumed was merely one of chance, and entirely unnecessary so far as concerned any duty in which he was engaged.

It is not the case of an employe injured upon the track while engaged in repairing it, or in some duty *necessarily* requiring him to be thereon. So far as relates to the work he was occupied with at the time, deceased voluntarily and unnecessarily assumed a dangerous position, instead of a position of perfect safety. Where an employe chooses to perform his duty in a hazardous manner, when there is a safe method of doing it, he is wanting in ordinary care.

Iron Co. vs. Brennan, 20 Brad, (Ill.), 555.
Cunningham vs. Ry. Co., 17 Fed. Rep., 882.
Holland vs. Ry. Co., 18 Fed. Rep., 243.
R. R. Co. vs. Jones, 95 U. S., 439,
Kresanowski vs. R. R. Co., 18 Fed. Rep., 229.
Behrens vs. Ry. Co., 5 Col., 400.
Abend vs. R. R. Co., 111 Ill., 202.
Simmons vs. R. R. Co., 110 Ill., 340.

Nor did the fact that his attention was diverted to the handcar, or the men upon it, excuse him from taking due precaution for his own safety.

Redmond vs. R. R. Co., (N. Y.) 10 N. Y., Supp. 330.

(2). The fact that a flying switch was being made at the time did not relieve the deceased from the duty of looking for approaching trains. Even as to the public a flying switch does not always excuse a person from the duty of looking and listening for the approach of cars. That duty is demanded, because of the fact that the person is about to cross a railroad track whereon trains may be expected at any time, and the persons so crossing are bound to be upon the lookout for them.

Ormsbee vs. R. R. Co., 14 R. I., 102.
Grethen vs. Ry. Co., 22 Fed. Rep., 609.

The decisions to the contrary are based upon exceptional circumstances. Those relied upon by the plaintiff in error are distinguishable. They were cases where flying switches were made over highway crossings or upon depot grounds or public places, and the persons injured were not employes.

The fact that a flying switch is being made, does not relieve an employe from the duty to look and listen.

Behrens vs. Ry. Co., *ante*.
Haley vs. R. R. Co., 7 Hun., 84.
Myers vs. R. R. Co., 113 Ill., 386.
Ry. Co. vs. Bracken, 59 Tex., 71.
Collins vs. R. R. Co. (Iowa), 49 N. W. Rep., 848.

It is respectfully submitted that the judgment of the court below was right upon the whole record, and that it should be affirmed.

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